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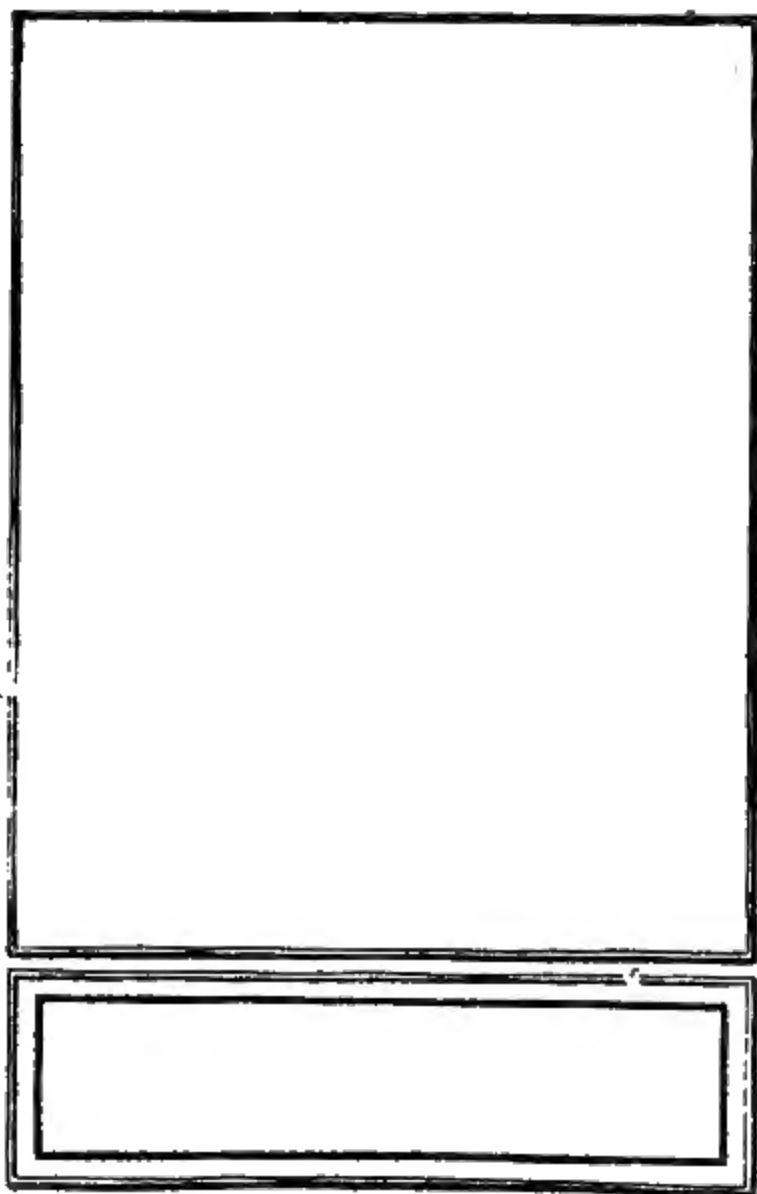
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**CONTRIBUTIONS TO INTERNATIONAL LAW  
AND DIPLOMACY**

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**INTERNATIONAL LAW  
AND THE WORLD WAR**



UNIV. OF  
**INTERNATIONAL LAW**  
**AND THE WORLD WAR**

BY  
**JAMES WILFORD GARNER**  
"PROFESSOR OF POLITICAL SCIENCE IN THE  
UNIVERSITY OF ILLINOIS

**VOLUME I**

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TO MY FORMER TEACHER  
JOHN BASSETT MOORE  
PRE-EMINENT AUTHORITY  
WISE COUNSELLOR OF STUDENT DAYS

TO THE  
LIBRARY OF THE  
CONGRESS

## PREFACE

**T**HE preparation of this treatise was undertaken by me at the request of the late Dr. L. Oppenheim, Whewell Professor of International Law at Cambridge University. Like most international jurists, he was deeply stirred by the numerous and shocking violations of that law which he justly regarded as one of the most notable achievements of modern civilization and to the understanding of which he had contributed so much by his researches and writings. It was his desire that I should review the conduct of the belligerents in respect to their interpretation and application of the rules of international law, compare it with the opinion of the authorities and the practice in former wars and wherever infractions appeared, to endeavor to determine the responsibility and to place it where it properly belonged. I fully shared his view that the latter task was one which jurists and text writers, who are in a sense the guardians and defenders of the law of nations, could not neglect without ignoring their duty to the law and to the cause of justice which it was designed to promote. With this view of my duty I have made a conscientious effort to evaluate the evidence so far as it was available, and wherever possible to arrive at conclusions as to the truth or falsity of the charges and counter-charges in respect to infractions.

Naturally, the task of preparing a work of this kind during the progress of the war was beset by many difficulties. With the archives of foreign offices closed to historians and investigators, and with newspapers and books published in enemy countries shut out by blockades and censorships, important sources of information were necessarily inaccessible to me. After the United States became a belligerent not even technical and scientific publications were admitted from enemy countries. In consequence of this, the German defence to many charges made against them for violating the law was not always known to me, or was known only through newspaper

despatches from neutral countries. Nevertheless, the views of the German jurists on all questions of international law the rules of which the Germans were charged with disregarding were so distorted and colored by partisanship that it may be doubted whether their inaccessibility was a loss of any real consequence, and I may add that Professor Oppenheim shared with me this view as to the untrustworthiness of German authority. Fortunately, the desire of the various belligerent governments that their cases should be submitted to the neutral world in the hope of a favorable verdict and that even their own peoples should be kept fully informed regarding the measures of their governments, caused them to publish and distribute the more important of their diplomatic documents and other material, such as in former wars were never made public at all or only after a long interval. A great mass of parliamentary papers, reports, despatches and the like was, therefore, rendered available, and to the greater part of this I have had access. In addition, there is an extensive literature of varying value in the form of books and pamphlets the more important of which I have listed in a bibliography at the end of volume two. It is hardly necessary to say that it has been quite impossible within the limits of this treatise either to deal fully with all the multifarious questions of international law, old and new, that arose during the late world-wide war, or to discuss the practice and interpretation of all the thirty belligerent governments involved, to say nothing of the varying policies and measures of neutral powers. I have been obliged, therefore, to limit my treatment, for the most part, to the more important questions raised, and to the policies and conduct of the principal belligerent and neutral powers.

Professor Oppenheim, to whom I was deeply indebted, died soon after the manuscript of the book had gone to the printer. In his untimely death the science of international law was deprived of one of its most pre-eminent authorities and I, of a wise and sympathetic counsellor. He had, however, completed the reading of the manuscript and had, before laying down his burden, given me the benefit of many valuable suggestions all of which I was glad to adopt.

JAMES W. GARNER

URBANA, ILLINOIS  
*April 1, 1920*

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**INTERNATIONAL LAW  
AND THE WORLD WAR**



# INTERNATIONAL LAW AND THE WORLD WAR

## CHAPTER I

### *THE STATUS OF INTERNATIONAL LAW AT THE OUTBREAK OF THE WAR*

§ 1. The Growth of the Written Law; § 2. The American Instructions of 1863 for the Government of the Armies; § 3. Other Manuals; The German *Kriegsbrauch im Landkriege*; § 4. The French Manual; § 5. The British Manual; § 6. The American Rules of Land Warfare (1914); § 7. Naval Codes; § 8. The German Prize Code; § 9. The French Naval Manual; § 10. Evaluation of the Manuals; § 11. International Conventions: the Declaration of Paris; § 12. The Geneva Conventions; § 13. The Declaration of St. Petersburg; § 14. The Brussels Conference of 1874; § 15. The Hague Conventions and Declarations of 1899; § 16. The Hague Conventions and Declarations of 1907; § 17. Were the Hague Conventions Binding on the Belligerents during the Late War? § 18. Attitude of the Prize Courts in Respect to the Binding Force of the Hague Conventions; § 19. The Status of Maritime Law in 1914; § 20. The London Naval Conference, 1908-1909, and the Declaration of London; § 21. Status of the Declaration of London; § 22. Application of the Declaration during the Late War; § 23. Abrogation of the Declaration by Great Britain and France; § 24. To what Extent was the Declaration Binding on the Belligerents?

§ 1. **The Growth of the Written Law.** If we compare the rules which determined the rights and duties of belligerents in the recent war with those which governed the conduct of war a century ago, we shall be struck by one notable difference, namely, that the laws of war which then existed were for the most part unwritten. Aside from a few stipulations found in treaties, dealing with such matters as the treatment of alien enemies, maritime capture, the right of search and contraband, the laws of war consisted mainly of customs and usages, the evidence of which was found in the histories, treatises of text writers, and in the decisions of prize courts.<sup>1</sup>

<sup>1</sup> Compare an address by M. Renault entitled "War and the Law of Nations," delivered before the Institute of France on October 26, 1914, and printed in *Amer. Jour. of Int. Law*, Vol. IX (1915), pp. 1 ff.

From a body of tradition and custom, the law of war has gradually developed, however, during the last fifty years into a fairly definite system of rules, many of which are now embodied in international conventions and declarations, and in official manuals or ordinances issued by States for the guidance of their military and naval commanders.

§ 2. **The American Instructions of 1863 for the Government of the Armies.** The starting point in this development was the promulgation by President Lincoln, in 1863, of the "Instructions for the government of the armies of the United States in the field." These "Instructions," as is well known, were drafted by Dr. Francis Lieber, a distinguished German-American publicist, who in early life had served under Blücher, and who in 1822 had sought asylum in the United States from the oppression of his own land. The draft prepared by him was revised by a board of army officers and after its approval by the President was issued as general order No. 100.

The need of a manual of this kind had become manifest in the early months of the Civil war. Armies of unexampled size had been placed in the field; they were composed in great part of untrained volunteers, and were commanded by men some of whom were quite unfamiliar with the usages of war. Questions involving a knowledge of the rules of international law, and particularly those relating to the powers and duties of commanders in respect to treatment of the enemy, were constantly arising, and in some cases conflicting decisions were rendered by commanders in different fields, and at times in different parts of the same field. Not infrequently great harm resulted before the decisions could be reversed by the competent authority.<sup>1</sup> It was to meet this situation that Dr. Lieber was invited by the President to prepare a body of rules for the guidance of military commanders and troops. The instructions thus prepared and issued were distributed to the armies and rigorously enforced.<sup>2</sup> They received high praise from international jurists, and undoubtedly exercised an important influence on the subse-

<sup>1</sup> Davis, "Dr. Francis Lieber's Instructions for the Government of Armies in the Field," *Amer. Jour. of Int. Law*, Vol. I, p. 13.

<sup>2</sup> Davis, *Elements of International Law*, 3d ed., pp. 499-500.

quent development of the laws of war. "Thus it was to the United States and to Lincoln," says Martens, "that the honor belongs of having taken the initiative to define and determine with precision the laws and usages of war."<sup>1</sup> The Instructions of 1863 remained in force until 1914, when they were superseded by a new manual entitled "Rules of Land Warfare," prepared and issued under the direction of the war department. "Everything vital," we are told, "contained in the Instructions of 1863 were incorporated in the new manual and wherever practicable the original text was retained." Various obsolete provisions were left out and new rules added to bring the manual into conformity with the Hague and Geneva conventions.

As is well known the American instructions formed the basis of the *projet* adopted by the Brussels Congress of 1874, the basis of Bluntschli's proposed code, and to a considerable extent the basis of the Hague conventions of 1899 and 1907. Whatever may have been their defects, they rendered a great service, as M. Renault remarks, by demonstrating the possibility of subjecting the conduct of armies to precise written rules.<sup>2</sup>

§ 3. Other Manuals; The German "*Kriegsbrauch im Landkriege*." The example thus set by the United States was soon followed by other governments, which proceeded to issue ordinances or manuals of instructions for the guidance of their military commanders. Such manuals were issued by the government of the Netherlands in 1871,<sup>3</sup> by the French government in 1877,<sup>4</sup> by Servia in 1879, by Spain in 1882, by Portugal in 1890, and by Italy in 1896.<sup>5</sup>

The Hague Convention of 1899 respecting the laws and customs of war on land (Art. I) imposed on the contracting

<sup>1</sup> *La Paix et la Guerre* (French trans. by de Lance), p. 77; compare also Merignhac, *Les Lois et Coutumes de la Guerre sur Terre*, p. 21.

<sup>2</sup> Address referred to above, p. 2. See also his preface to the French manual, *Les Lois de la Guerre Continentale* (4th ed., 1913), p. 10.

<sup>3</sup> "Practical Manual of the Laws of War," prepared by General den Beer Poortugael.

<sup>4</sup> *Manuel de Droit Int. à l'Usage des Officiers de l'Armée de Terre*, by M. Billot.

<sup>5</sup> The character of some of these early manuals is discussed by Holland in his *Studies in International Law*, ch. 4; by Merignhac in his *Les Lois de la Guerre Continentale*, pp. 4 ff.; and by Bellot in *Pubs. of the Grotius Soc.*, Vol. II, p. 40.

parties an obligation to issue instructions to their armed forces, which should be in conformity with the regulations annexed to the said convention. Many States, however, did not comply promptly with the duty imposed by the convention and apparently some have not even yet done so. As late as 1903 Martens complained that only a few governments had issued instructions as required by the convention, and he added that the Conference had made a mistake in not fixing a time limit within which the obligation should be performed.<sup>1</sup>

The first government to act in pursuance of the duty thus imposed appears to have been that of Germany. In 1902 the German general staff prepared the well-known *Kriegsbrauch im Landkriege* for the guidance of military commanders, and it was issued with the approval of the government.<sup>2</sup> It has been much criticised, especially by French, English, and American writers, for the extreme views which it adopts, particularly in regard to the rights of belligerents. In this respect it embodies largely the views of von Clausewitz, von Hartmann, von Moltke, Loening, Leuder, and other German military writers of the von Clausewitz school. It lays down the principle that war is not merely a conflict between armed forces, but that it is legitimate for a belligerent to destroy the spiritual (*geistig*) as well as the material power of the enemy.<sup>3</sup> To this end it is permissible to destroy private property, terrorize the inhabitants, bombard towns without notice, compel the inhabitants to work on fortifications, dig trenches, furnish conveyances, etc., serve as guides, and even to furnish the enemy with information regarding their own army, to exact contributions for the purpose of breaking the spirit of resistance of the enemy and compel him to sue for peace, to requisition

<sup>1</sup> See his preface to Merignac's *Lois et Coutumes de la Guerre sur Terre*, 1903, p. viii.

<sup>2</sup> The *Kriegsbrauch* has been translated into French by Carpentier under the title *Les Lois de la Guerre Continentale, publication du Grand État-Major Allemand* (1904) and into English by Professor J. H. Morgan of University College, London, and published under the title *The War Book of the German General Staff* (1915).

<sup>3</sup> The Superior Court of Military Justice of the German Empire in a notable decision rendered on Aug. 10, 1915, repudiated this doctrine of the *Kriegsbrauch* and declared that war is a contest between States only and does not affect the rights of private individuals. Text in Clunet, 1917, pp. 257 ff. But in practice the German government and its armies acted generally in accordance with the teaching of the *Kriegsbrauch*.

supplies without payment and without respect to the resources of the country, to impose heavy fines on communities for individual offences which the authorities are powerless to prevent, and in extreme cases even to put prisoners to death. It warns military commanders against the humanitarian tendencies of the time and refers to the humane principles of the Hague conventions as "sentimentalism and flabby emotion" (*Sentimentalität und weicheliche Gefühlsschwärmerei*).<sup>1</sup> The predominating feature of the manual is the extreme view of military necessity which it adopts and the emphasis which it places on the distinction between *Kriegsraison* and *Kriegsmanier*, a distinction which is generally interpreted to mean that the obligation of a belligerent to conform to the established rules of international law is subordinated to the law of military necessity; that is to say, the duty of observance ceases whenever conformity thereto interferes with the attainment of the objects of the war.<sup>2</sup>

The *Kriegsbrauch* abounds in charges against the French for having violated in many instances the laws of war during the war of 1870-1871, and it undertakes to defend the conduct of the German commanders against the counter accusations of the French,<sup>3</sup> the conduct of the Germans having been characterized, we are told, by unusual tenderness and consideration for the rights of the inhabitants of the districts occupied by the German forces. The authority of no great foreign master on international law<sup>4</sup> is invoked in support of the views which it defends, and the better and more enlightened practice in the wars of the past is ignored in its citation of precedents. Whenever a German writer could be found to support the views which it enunciated he was quoted; others were passed over in

<sup>1</sup> See especially the introductory chapter.

<sup>2</sup> Concerning this distinction see Leuder in Holtzendorff's *Handbuch des Völkerrechts*, §§ 65-66; Holland, *Laws of War on Land*, p. 13; Westlake, *International Law*, Pt. II, p. 127; and Morgan, the *War Book of the German General Staff*, p. 69. The German distinction between *Kriegsmanier* and *Kriegsraison* is discussed more at length in §§ 439-440 of this work.

<sup>3</sup> For example, the levying of heavy fines on French communes for individual acts for which the community was not collectively responsible and even for such acts as Count Renard's threat to shoot a number of French civilians for the refusal of certain laborers to work for the German military authorities.

<sup>4</sup> Except Rolin Jacquemyns, who in two articles in the *Revue Générale de Droit Int. et de Lég. Comparée* (vols. II and III) attempts to justify certain of the indefensible acts of the Germans in France in 1870-1871.



silence. One of its most regrettable features is its scant allusions to the Hague conventions. In too many instances where they are mentioned it is only in derision. Some of its rules are in direct contradiction to the provisions of the Hague *règlement* to which manuals of instructions issued by States are required to conform, while other provisions of the *règlement* are dismissed with the statement that they will never be observed by belligerents in practice.

§ 4. **The French Manual.** In these respects the German *Kriegsbrauch* forms a striking contrast to the French manual, *Les Lois de la Guerre Continentale*, drafted by Lieutenant Robert Jacomet and published under the direction of the general staff of the French army (4th edition, 1913).<sup>1</sup> This manual reproduces literally the Hague regulations respecting the laws and customs of war. The various provisions of the *règlement* are accompanied by annotations and explanatory notes which not infrequently declare that they shall be interpreted liberally and in favor of the rights of the inhabitants of occupied territory. In respect to such matters as giving notice in case of bombardments, the rights of a military occupant over the inhabitants, the levying of contributions and the taking of guides and hostages from the non-combatant population, the rules of the French *manuel* are entirely in accord with the humane and enlightened views generally held by international jurists and text writers as well as those embodied in the Hague conventions.<sup>2</sup>

A few other governments have issued manuals of instruction in conformity with the requirements of the Hague convention or have given semi-official approval to codes prepared by private individuals. Among the more distinctly official

<sup>1</sup> The French writer Dampierre (*German Imperialism and International Law*, p. 150) remarks, however, that the German delegates at the second Hague Conference virtually repudiated the *Kriegsbrauch*, and he adds that the official instructions issued by the German government since 1902 are quite in harmony with the letter of the Hague regulations concerning land warfare. See his quotations (pp. 151-153) from the 28th *Kriegsartikel*, of the manual prepared for the use of German officers by Michaelis in 1908 (*Der Dienstunterricht des Infanterie-Officiers*) and from the book of Captain Nicolai (*der Infanterie-Leutnant im Felde*, Berlin, 1912). It is refreshing to observe that the rules laid down in these publications form a striking contrast to those of the *Kriegsbrauch*.

<sup>2</sup> Compare especially the provisions on pp. 62, 69, 71, 75, 76, and 78 of the French *Manuel* with the corresponding rules of the *Kriegsbrauch im Landkriege*.

publications may be mentioned the Swiss regulations of 1904, which reproduce the texts of the Hague conventions, although Switzerland was not at the time a party to any of the conventions; those of Russia of 1904;<sup>1</sup> the Japanese regulations of 1904,<sup>2</sup> and the Austro-Hungarian service regulations approved May 2, 1913,<sup>3</sup> the latter of which, unlike the German manual, embodies textually the essential portions of the Hague conventions.

§ 5. *The British Manual.* In 1879 the work of preparing a British manual and rules of procedure under § 69 of the army discipline and regulation act of that year was undertaken at the request of the secretary of state for war, but it was not completed until 1882. It contained a chapter on the "customs of war" prepared by Lord Thring, but it had no "official authority." In 1904 Professor Holland's *Laws and Customs of War on Land* was issued by the government, and in 1908 a new edition embodying the provisions of the Hague conventions appeared. Meantime the manual of military law was revised and extended, the last edition appearing in 1914. Besides the army act and the rules of procedure thereunder, it contains fourteen chapters on various subjects, such as the history of military law, courts martial, offences and punishment, relation of officers and soldiers to civil life, the laws and usages of war on land, etc., prepared by various authors.

The chapter on the laws and usages of war on land,<sup>4</sup> prepared by Colonel Edmonds and Professor Oppenheim, contains an exposition of the rules governing the conduct of warfare on land. Unlike the German manual, however, it embodies the provisions of the various international conventions, many of them textually, and on the points not covered by those conventions it declares that they "remain the subject of customary

<sup>1</sup> See the text of the Russian regulations in Hershey, *International Law and Diplomacy of the Russo-Japanese War*, pp. 268-281. The Russian regulations contain many humane views (see the analysis in Meringhac, p. 5), but they contain other provisions which are "far from adequately representing the Hague rules." Holland, *Laws of War on Land*, p. 6.

<sup>2</sup> Text in Hershey, *op. cit.*, pp. 282, 294.

<sup>3</sup> English text in *Proclamations, Orders in Council, and Documents Relating to the European War*, 2d Supp., pp. 451 ff., compiled and published by the secretary of state of Canada, in 1916. The Austro-Hungarian government had issued in 1904 a *règlement* relating to the conduct of land warfare, but like a similar ordinance issued by Germany in 1900 it contained few rules of international law.

<sup>4</sup> Pp. 234 ff.

rules and usage.”<sup>1</sup> In no case does it appear that the rules of the international conventions are repudiated or departed from or criticised as impracticable or as unlikely to be observed. It expressly adopts the rule of the Hague convention in regard to the means which may be employed for weakening or destroying the enemy. Those means, it adds, “are in practice definitely restricted by international conventions and declarations and also by the customary rules of warfare.” Moreover, “there are the dictates of religion, morality, civilization and chivalry which ought to be obeyed.” It condemns the practice of placing innocent citizens on trains as hostages, although it admits that this practice was resorted to by the British in South Africa.<sup>2</sup> Hostages may be taken for certain purposes, but they are to be treated as prisoners of war, and in no case may prisoners be put to death except that they may be shot for resisting the guards or for attempting to escape.<sup>3</sup> It forbids collective penalties for acts of individuals for which the community is not collectively responsible;<sup>4</sup> it forbids compulsory labor for the construction of intrenchments and fortifications;<sup>5</sup> it allows the requisition of supplies only for the needs of the army, and these must be paid for;<sup>6</sup> contributions for the enrichment of the enemy are forbidden, etc. Altogether the rules laid down in the British manual are irreproachable; they are humane and liberal and represent the most enlightened views regarding the conduct of land warfare.

§ 6. *The American Rules.* The *United States Rules of Land Warfare* of 1914 follow in form and spirit<sup>6</sup> the British and French manuals. This manual incorporates the texts of the Hague and Geneva conventions, and its rules are substantially those of the conventions, with such additional provisions as were necessary to cover points not dealt with by the latter. There appear to be no provisions in the American rules that are not in conformity with the Hague regulations.

§ 7. *Naval Codes.* Although no such obligation is imposed by any of the Hague conventions, a number of States have issued ordinances for the guidance of their naval commanders in the conduct of maritime warfare or have given semi-official sanction to codes prepared by naval experts. In 1888 the

<sup>1</sup> P. 235.

<sup>2</sup> *Ibid.*, p. 306.

<sup>3</sup> *Ibid.*, p. 247.

<sup>4</sup> *Ibid.*, p. 292.

<sup>5</sup> *Ibid.*, p. 293.

<sup>6</sup> *Ibid.*, p. 298.

British manual of naval prize law, edited by Professor Holland and originally prepared by Mr. Godfrey Lushington, was issued by authority of the lords commissioners of the admiralty, but it is no longer in force.<sup>1</sup>

In 1900 Admiral Stockton of the United States navy prepared a naval code containing rules for the guidance of American naval commanders.<sup>2</sup> It was issued as order No. 551 of the navy department on June 27 of that year, but the order was revoked by President Roosevelt in 1905, not because the desirability of such a body of rules was not recognized, but because in the opinion of the President certain of the rules of Admiral Stockton's code would unnecessarily handicap American naval officers in case of a war between the United States and a foreign power, particularly in view of the fact that these rules were not binding upon any other powers.

§ 8. **The German Prize Code.** On September 30, 1909, a prize ordinance (*Prisenordnung*) was issued by the Imperial government of Germany, and this was followed on April 15,

<sup>1</sup> In the controversy over the case of the *Bundesrath* in 1899 (*Parl. Papers*, 1900, Africa, No. 1) it was denied that the manual of naval prize law had any authority, and it has since been withdrawn. The English system of prize law rests chiefly on the Naval Prize Act of 1864, the Prize Courts Act of 1894, and various orders in council issued thereunder. The remainder consists of judicial decisions. The procedure of the prize courts is regulated by the prize court rules of 1914, issued by an order in council of August 5, 1914. Thomas Gibson Bowles, in his book *The Declaration of Paris* (p. 7), published in 1900, lamented the fact that the British government had not thought it advisable to issue a code of instructions for the use of its naval commanders. "The crying need of the British navy which experience daily emphasizes," he wrote, "is a manual of the law of nations for the special use of British seamen." A British naval captain, he added, who might make a capture alone and far away from all counsel, was left when confronted by a difficult case "to steer his way through the intricacies of the law without any other aid than he could derive from a few ill-chosen works on the law of nations in general . . . and which often fail to meet the seaman's case in a way which a seaman could understand."

<sup>2</sup> The circumstances under which Admiral Stockton's code was prepared are set forth in *International Law Situations* for 1900, pp. 1 ff. See pp. 103 ff. for the text of the code. Professor Holland in the *London Times* of April 10, 1901, spoke in high terms of the code and expressed the opinion that it was worth considering whether something resembling it would not be useful in the British navy. "Our code," he added, "might be better arranged than its predecessor, and would differ from it on certain questions, but should resemble it in clearness of expression, in brevity, and above all things, in frank acceptance of responsibility. What naval men most want is definite guidance in categorical language upon those points of maritime international law upon which the government has not made up its mind."

1911, by a prize court ordinance (*Prisengerichtsordnung*). These ordinances were promulgated on August 3, 1914 (the day on which war broke out between Great Britain and Germany), and together with several amendments they constitute the present German prize code.<sup>1</sup> It contains a fairly complete body of regulations governing captures at sea, search, transfers of flag, contraband, unneutral service, and blockade. Unlike the *Kriegsbrauch im Landkriege*, the rules of the German prize code in respect to capture are, for the most part, in conformity with the Hague conventions, while its provisions in respect to transfers of flag, contraband, unneutral service, and blockade are largely literal reproductions of the corresponding rules of the Declaration of London. As to the right of a belligerent to destroy neutral merchant vessels, however, the German prize code goes further than the Declaration of London and allows destruction for inability to spare a prize crew, for lack of a sufficient coal supply, or because of proximity to the enemy's coasts. The rules of the code in respect to the duty of captors to provide for the safety of passengers and crews before destroying merchant vessels are practically identical with those of the Declaration of London, although, as is well known, the German submarine commanders during the recent war did not conform to them. On the whole the German prize code is irreproachable and contrasts markedly in this respect with the German code of land warfare.

§ 9. **The French Naval Manual.** One of the best naval manuals is that of France. It is entitled *Instructions sur l'application du droit international en cas de guerre, adressées par le ministre de la marine à mm. les officiers généraux, supérieurs et autres commandant les forces navales et les bâtiments de la République*. Prepared by the first section of the general staff, the Manual appears to have been first issued by the minister of marine on December 19, 1912, and in amended form was reissued on January 30, 1916.<sup>2</sup> It is a code of thirty-four articles sub-

<sup>1</sup> This code has been translated into English by C. H. Huberich and Richard King under the title *The Prize Code of the German Empire as in Force July 1, 1915* (New York and London, 1915). The English translation is also accompanied by the German text.

<sup>2</sup> Published by the *Imprimerie Nationale*, Paris, 1916. The English text of the 1912 edition is published in *International Law Situations* for 1913, pp. 169 ff. The revised edition of 1916 contains few important changes in the edition of 1912,

divided into 166 sections. In general it follows the plan of Admiral Stockton's code and is based mainly on the Declaration of Paris, the Hague conventions, and the Declaration of London. In annexes the texts of these conventions and declarations are reproduced, and subject to the modifications made in the Declaration of London after the outbreak of the late war, naval commanders were instructed to observe strictly their provisions. By a decree of May 2, 1913, the Austro-Hungarian government promulgated a code of regulations to be observed by its commanders in the conduct of maritime war. These regulations contain merely "the provisions of international law on war in so far as they have been fixed by agreements." Like the French regulations they reproduce the essential portions of the Declarations of Paris and London, and those of the Hague conventions, but they add the following statement: "If necessary, regulations varying the same will be issued."<sup>1</sup> By a decree of March 25, 1917, the Italian government promulgated a body of rules (112 articles) relative to the right of capture during the existing war. They deal with conversion, capture, status of enemy vessels in Italian ports at the outbreak of war, blockade, contraband, visit and search, destruction of merchant vessels, etc.<sup>2</sup> In 1913 the Institute of International Law at its Oxford meeting adopted a manual of the laws of maritime war containing 153 articles which, although having no official character, embodied the rules which have for the most part received common approval in practice.<sup>3</sup>

§ 10. **Evaluation of the Manuals.** Some of the naval manuals thus issued were intended for use during particular wars; they were hastily prepared, were not always well thought out, and

the additional matter being mainly in explanation and amplification of the rules of the earlier edition. The list of contraband articles is of course enlarged, the rule of continuous voyage is sanctioned, and in certain cases the burden of proof is placed on the owners of contraband cargoes. French text in 25 *Rev. Gén. de Droit Int. Pub.* (1918), pp. 60 ff. In 1891 a naval officer named Rosse prepared and published a handbook entitled *Guide International du Commandant de Bâtimens de Guerre*, dedicated to vice admiral Humann, which, although it has no official character, may be regarded as representing the French official view in regard to the laws of maritime warfare. It contains a summary of the laws governing capture, traffic in contraband, blockade, and the like. *Librairie Militaire de L. Boudoin*, Paris, 1891, pp. 291 ff.

<sup>1</sup> Text in Canadian *Proclamations*, etc., referred to above, 2d Supp., pp. 425 ff.

<sup>2</sup> French text in 23 *Rev. Gén.*, Docs., pp. 193 ff.

<sup>3</sup> Text in the *Annuaire* of the Institute, Vol. 26, pp. 26-169.



were not intended to be general permanent codes for the conduct of maritime warfare. In this respect the German and French codes are an exception. They were prepared in time of peace, and although both were altered in certain particulars upon the outbreak of the recent war, in the main they retained the form in which they were originally issued.

The practice thus adopted by States of issuing manuals of instructions for the guidance of their military and naval forces marks an important step in the development of the laws of war. The effect has been to define, systematize, and reduce to writing many of the rules governing the conduct of war on land and sea. The great defect with these manuals and regulations, however, is that, being unilateral acts, they are binding only on the commanders and troops of the nation which issues them and are without international effect.<sup>1</sup> They may, of course, be altered by the government which issues them, except in so far as the obligatory character of their rules is established by international law, and there is no obligation on the part of the government which promulgates them to observe their provisions unless their adversaries in war accord reciprocity of treatment.<sup>2</sup> The need, therefore, for an international code containing an authoritative statement of the rules of war law, formulated and sanctioned by the whole body of States and consequently binding on all of them, became more and more manifest as time passed.<sup>3</sup> Happily this need has been partially realized.

§ 11. International Conventions. The Declaration of Paris. The starting point in the movement which brought this to pass was the adoption of the Declaration of Paris of 1856, which laid down certain rules regarding the law of capture and of blockade, concerning which there had been a divergence of opinion and practice between the two leading maritime powers, Great Britain and France. The Declaration was framed by the representatives of Austria, France, Great Britain, Prussia, Russia, Sardinia, and Turkey. At the outbreak of the war

<sup>1</sup> Compare the remarks of Renault in his preface to the French *Manuel*, p. 10, and Holland, *Laws of War on Land*, p. 2.

<sup>2</sup> The French *Manuel* (p. 26) expressly declares that the observance by the French army of the rules laid down in the manual is impliedly subordinated to reciprocity of treatment on the part of France's adversaries.

<sup>3</sup> Cf. Holland, *Studies in International Law*, ch. 4.

in 1914 the only maritime powers which had not formally accepted the Declaration were the United States, Spain, Mexico, Venezuela, Bolivia, and Uruguay, none of which except the United States became belligerent in the recent war.<sup>1</sup> In practice the United States acted in accord with its rules during the Civil war, and during the Spanish-American war of 1898 both belligerents observed its principles. At the Second Hague Conference of 1907 the delegates of Spain and Mexico, in voting on convention No. VII, declared that their governments accepted the Declaration in its entirety.<sup>2</sup>

§ 12. **The Geneva Conventions.** The agreement thus reached in respect to the law of capture at sea paved the way for further international legislation and in 1864 a conference of delegates representing sixteen powers assembled at Geneva for the purpose of framing a convention intended to ameliorate the condition of the sick and wounded in war by providing certain immunities for the persons who are charged with their care, and for hospitals, ambulances, and other agencies employed in such service. The convention was signed by the representatives of twelve powers, and in less than four years all Europe and most of the States of America had accepted it. It represented one of the first notable attempts to define and codify through international agreement certain usages of war.<sup>3</sup> Some additional articles extending its provisions to maritime warfare were added in 1868, although they did not become

<sup>1</sup> The Declaration contained a provision to the effect that it should not be obligatory except between the powers which had acceded to it or which should in the future accede to it. The British prize court in the case of the *Batavier II* (Treherm's Cases, II, 432) interpreted the Declaration to mean that the protection which the neutral flag affords extends only to enemy goods actually under that flag and not to those which have been brought into a British port before the outbreak of hostilities and landed for the purpose of transshipment. Likewise in the case of the *Bawean* (*ibid.*, III, 16) it held that the protection which the Declaration confers upon enemy goods in a neutral vessel does not cover goods transshipped from an enemy vessel.

<sup>2</sup> Higgins, *The Hague Peace Conferences*, p. 3. Thomas Gibson Bowles, however, argues that the Declaration is not a part of international law. It was, he asserts, never presented to the British Parliament for approval, notwithstanding the fact that it altered the common law of England. Moreover, the draft approved by the Queen was incomplete and differed in many respects from the Declaration as finally signed. Cf. his *Declaration of Paris*, ch. XII, especially p. 129.

<sup>3</sup> Martens, *La Paix et la Guerre*, p. 81. For further literature on the Geneva convention, cf. Moynier, *Étude sur la Convention de Genève*, and Davis, *Amer. Jour. of Int. Law*, Vol. I, pp. 409 ff.



binding because of lack of unanimity in their ratification. Nevertheless they were observed by the belligerents during the Franco-German war of 1870-1871 and during the Spanish-American war of 1898; and in 1899 they received the approval of the First Hague Conference, which extended its provisions to maritime warfare. In 1906 the convention was revised and improved by a conference at Geneva representing more than thirty States, and it has been accepted by practically all the States of the world.

§ 13. **The Declaration of St. Petersburg.** Another stage in the progress of international law was the adoption in 1868 of the Declaration of St. Petersburg, by which the powers not only engaged to refrain from employing a type of bullet which was condemned by the humanitarian sentiment of the time, but also laid down certain fundamental principles concerning the legitimate objects of war.<sup>1</sup> This Declaration was framed by a conference of representatives of Great Britain, Austria-Hungary, Bavaria, Belgium, Denmark, France, Greece, Italy, The Netherlands, Persia, Portugal, Prussia, the North German Confederation, Sweden, Norway, Switzerland, Turkey, and Württemberg. Baden and Brazil subsequently adhered to the Declaration.<sup>2</sup> The preamble to the Declaration lays down the proposition that there are "technical limits at which war ought to yield to the requirements of humanity"; that "the progress of civilization should have the effect of alleviating as much as possible the calamities of war"; that the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy; that for this purpose it is sufficient to disable the greatest possible number of men; that this object would be exceeded by the employment of arms which needlessly aggravate the sufferings of disabled men or render their death inevitable, etc." This act with its enlightened and humane declarations has been accepted by a large number of States and is embodied in their

<sup>1</sup> The circumstances leading to the call of the conference by the Czar are detailed by Martens in his *La Paix et la Guerre*, pp. 88 ff.

<sup>2</sup> Higgins, *op. cit.*, p. 7. It is interesting to note in this connection that the Prussian delegates desired to go even further and extend the prohibition adopted to such agencies of destruction as bar and chain shot, the use of which German writers had generally condemned. Bordwell, *Law of War*, p. 88, and Martens, *op. cit.*, p. 88.

official manuals. It is significant that it was formulated not by jurists or philosophers but by a conference composed entirely of military officers. It is incorporated by reference in article 23 of the Hague *règlement* respecting the laws and customs of war, of 1899 and 1907, and similar humane principles are found in the declarations of the Hague Conference of 1899. It is, of course, binding only on the States which have ratified it or adhered to it. Higgins remarks that the general principles enunciated in the preamble appear to be practically obsolete, but that the fact of their adoption is of great importance, since they set a standard which, it is hoped, no civilized State in the future will fail to reach.

§ 14. The Brussels Conference of 1874. The success of these attempts to reach an agreement among the States of the world upon certain specific questions intensified the feeling that it was possible to systematize and codify through international agreement the general body of rules governing the conduct of war. The desirability of such an agreement was accentuated by the results of the Franco-German war, during which many charges and counter-charges of violations of the usages of war were made by both belligerents, and in the course of which many controverted questions arose which it was impossible for the belligerents to examine calmly.<sup>1</sup> During the year following the close of the war, General den Beer Poortugael, a distinguished Dutch jurist and military writer, published a book entitled *Het Oorlogsrecht*, in which he called attention to the divergence of opinion regarding many questions of war law and the desirability of defining and codifying the law, particularly with a view to imposing restrictions upon the powers of belligerent commanders. In the same year the Russian jurist, Martens, published in the Russian *Gazette* of St. Petersburg an article in which he advocated a codification of the laws and customs of war and urged that the Czar take the initiative in calling an international conference for this purpose. The Czar sympathized with the suggestion, and under his direction the governments of the various powers were approached with a view to obtaining their coöperation. The chief obstacle was the unsympathetic attitude of the British government, which regarded with scepticism the proposal to

<sup>1</sup> Cf. Martens, *La Paix et la Guerre*, pp. 91-92.

codify the laws of war, but upon assurance that the conference would confine itself strictly to the proposed program and would abstain from discussing questions of maritime law, it consented to appoint a delegate, although in fact he took no part in the conference and did not sign the act agreed upon.<sup>1</sup> The Czar's circular calling the conference stated that it had become necessary to determine with more precision the laws and usages of war in order to limit the consequences of war and to diminish its calamities as far as possible, and that it was indispensable to establish common rules which should be obligatory upon governments and their armies, on the basis of complete reciprocity. Unfortunately the military element predominated in the conference, and there was an irreconcilable divergence of opinion, particularly between the delegates of the great military powers and those of the smaller States, notably in respect to the rights of military occupants. In spite of this divergence of opinion, a body of rules governing the conduct of warfare was formulated and adopted, although naturally no agreement was reached on many points. The British government refused to ratify the act for various reasons, mainly because it was not limited to a statement of the existing usages but contained various innovations for which no practical necessity existed, and the effect of which would have been to give the preponderant advantage to the great military powers which had large standing armies.<sup>2</sup> In consequence of the refusal of Great Britain to ratify the act, it remained without international force. The final protocol of the conference stated, however, that "the delegates without exception were in accord on the imperative necessity of determining with more precision the usages and laws of war then in force."<sup>3</sup> It also unanimously

<sup>1</sup> Martens, *op. cit.*, p. 109. The United States likewise was not represented, as it was not at the St. Petersburg Conference of 1868.

<sup>2</sup> Lord Derby's reasons why England refused to ratify the act are contained in his despatch of January 20, 1875. Cf. Martens, *op. cit.*, p. 172. "One cannot help feeling," says Bordwell (p. 109), "in reading Lord Derby's objections, that he is reading the argument of a man who had made up his mind from the very first." Manning, in his *Commentaries on the Law of Nations* (p. xlv), expressed regret that England, which had always taken the lead in the movement to humanize the laws of war, should have assumed a position which paralyzed the work of the conference.

<sup>3</sup> The act of the Brussels Conference was approved in 1874 by the Institute of International Law — a body composed of the leading international jurists of the world — although Holland and Twiss doubted whether the time was ripe

reaffirmed the view expressed in the Declaration of St. Petersburg that the only legitimate object of war is to weaken the armed forces of the enemy without inflicting useless suffering upon the non-combatant population. Although not ratified, the *projet* of the conference was not without effect, since the rules which it formulated exerted a strong moral influence upon the conduct of the wars which followed, and many of them found their way into treaties and the manuals of instruction issued by States for the guidance of their military commanders.<sup>1</sup> Finally it received the approval of the Hague Conference of 1899, for it became the basis of the convention respecting the laws and customs of war adopted by the conference.

§ 15. **The Hague Conventions and Declarations of 1899.** The work of the Hague Conferences of 1899 and 1907 marked the culminating achievement in the half-century movement whose object was to systematize, define, and codify the laws and usages of war. As is well known, the Conference of 1899 adopted three conventions, three declarations, a resolution, and six *vœux* on different subjects. Five of the conventions and declarations deal with the conduct of war, their object being mainly to define more precisely the existing rules and to impose restrictions on the powers of belligerents in respect to the methods they may employ and the instruments they may use. The most important of them was convention II respecting the laws and customs of war on land which was ratified by all the States represented at the conference and has since been

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to attempt a codification of the laws of war and whether codification would not arrest their progressive development. Martens, *op. cit.*, p. 66. The approval of the act by the Institute added much to its authority. As is well known, the Institute in 1880 adopted a manual of the laws of war on land, thus "paving the way," says Holland (*Studies*, p. 88), "for a generally accepted written law by calling the attention of governments to the duty of promulgating authoritative instructions to their armies."

<sup>1</sup> "It also had from the first," Martens observes, "a great moral influence on the conduct of armies, embodying as it does the most authentic opinion of tacticians, diplomatists, and jurists relative to the laws and customs binding upon belligerent States and their armies." *La Paix et la Guerre*, p. 120. Cf. also Spaight, *War Rights on Land*, p. 6; Hall, *International Law*, Atlay's ed., p. 524; Higgins, *op. cit.*, p. 258, and Renault's address cited above. At the outbreak of the war between Russia and Turkey in 1877, the Russian government announced that it would conform its conduct to the provisions of the Brussels draft.

adhered to by nineteen others which were not so represented.<sup>1</sup> The powers thus ratifying and adhering included all the belligerents in the recent war. It was, therefore, legally binding upon all of them. Convention III extends to maritime warfare the principles of the Geneva convention of 1864, and it likewise was ratified by or adhered to by all the belligerents in the late war.<sup>2</sup>

§ 16. **The Hague Conventions and Declarations of 1907.** The Conference of 1907 adopted thirteen conventions and one declaration. All of them, except the convention for the pacific settlement of international disputes and the convention in respect to the employment of force for the recovery of contract debts, relate directly or indirectly to the conduct of war. They contain regulations concerning the opening of hostilities, the conduct of military operations, the rights of military occupants, the conversion of merchant vessels into warships, the status of enemy merchant ships at the outbreak of war, bombardments, the employment of submarine mines, the discharge of projectiles from balloons, capture in naval warfare, the extension of the Geneva convention to naval warfare, the rights and duties of neutrals in time of war, and the creation of an international prize court.

The convention of 1907 in respect to the laws and customs of war on land has not been ratified, however, by a number of States, including several which were belligerents in the recent war, namely, Brazil, Bulgaria, Greece, Italy, Montenegro, Servia, and Turkey.<sup>3</sup> In accordance, therefore, with article 11, sometimes called the "general participation clause," which declares that the provisions of the convention are not applicable except between the contracting parties and then only when all the belligerents are parties, it was not legally binding on any of the belligerents in the late war.

Convention V of 1907 respecting the rights and duties of neutral powers and persons in case of war on land has not been ratified by Great Britain, Bulgaria, Greece, Italy, Montenegro, Servia, and Turkey, all of whom were belligerents

<sup>1</sup> Cf. the table of ratifications in Scott, *The Hague Conventions and Declarations of 1899 and 1907*, pp. 230-232.

<sup>2</sup> Six belligerents in the recent war have not, however, ratified the revised Geneva convention of 1906.

<sup>3</sup> Table of ratifications, Scott, *op. cit.*, pp. 236-239.

in the late war. Therefore, according to article 20, its provisions were not legally binding on any of them.

Convention VI relating to the status of enemy merchant ships has not been ratified by a considerable number of States, including Bulgaria, China, Greece, Italy, Montenegro, Servia, Turkey, and the United States, all of whom were belligerents in the late war, and therefore, according to article 6, its provisions were not binding on any of the parties. For the same reason convention VII relative to the conversion of merchant vessels into warships was not binding; the same was true of convention VIII relative to the laying of automatic submarine contact mines; of convention IX concerning naval bombardments; of convention X for the adaptation to naval warfare of the principles of the Geneva convention; of convention XI relative to certain restrictions upon the right of capture in naval warfare, and of convention XII concerning the rights and duties of neutral powers in naval warfare.<sup>1</sup>

Among the belligerents in the recent war, Bulgaria, Italy, Montenegro, Servia, and Turkey do not appear to have ratified any of the conventions of 1907. Great Britain has not ratified the convention in respect to the rights and duties of neutral powers and persons in war on land, nor the convention for the adaptation of the principles of the Geneva convention to maritime warfare.

§ 17. Were the Hague Conventions Binding on the Belligerents during the Late War? The result was, none of the acts of the Conference of 1907 were legally binding on any of the belligerents during the late war. But the convention of 1899 respecting the laws and customs of war — of which the corresponding convention of 1907 is mainly a revision — having been ratified by all of them, was binding upon all; and so was the convention of 1899 for the adaptation of the principles of the Geneva convention to maritime warfare, of which the corresponding convention of 1907 is likewise a revision. In view of the fact that the conventions of 1907 respecting the laws and customs of war on land and for the adaptation of the principles of the Geneva convention to maritime war were

<sup>1</sup> Convention XII, relative to the creation of an international prize court, is without effect owing to the failure of the signatory powers to deposit their ratifications in accordance with art. 52, par. 2.



merely revisions of the corresponding conventions of 1899, it seems to have been the intention of the Conference of 1907 that the revised conventions should, when duly ratified, replace as between the contracting parties the earlier conventions, but that the latter should remain in force as between the powers which have ratified them, but which have not ratified the latter conventions.<sup>1</sup> There would seem to be no doubt, therefore, of the binding effect of the conventions of 1899 in a war in which all the belligerents are parties to these conventions, as was the case in the recent war. The other conventions of 1907, being new acts and not merely revisions of earlier conventions, were for the reasons stated not legally in force. Nevertheless, in so far as their provisions are merely declaratory of the existing laws and customs of war, they were of course binding independently of the status of the conventions of which they were a part. It was only those provisions which stipulate for the introduction of new rules that were not binding.<sup>2</sup> As a matter of fact, the great majority of the provisions of these conventions fall within the former category. Thus the preamble to the convention of 1907 respecting the laws and customs of war on land expressly states that its provisions are "intended to define and regulate the *usages* of war on land."<sup>3</sup> As Despagnet aptly remarks, the Hague *règlement* only specifies precisely the dispositions already admitted by all civilized nations without any dispute.<sup>4</sup> Baron Jomini, President of the Brussels Con-

<sup>1</sup> Cf. Scott, *Amer. Jour. of Int. Law*, Vol. IX, p. 193.

<sup>2</sup> Cf. Fauchille, *L'Évacuation des Territoires Occupés par l'Allemagne dans le Nord de la France*, pp. 9-19. Cf. also an article by Fauchille in 25 *Rev. Gén.*, p. 80. This view is admitted by German writers, e.g., Zitelmann, who remarks that a new convention which is nothing more than the formulation of a former one (e.g. the convention of 1907 concerning war on land, which is merely a reformulation of the corresponding convention of 1899, and the new Geneva convention, which is only a revision of the convention of 1864) is valid at least between the powers that have ratified it, even though one of the belligerents, which has ratified the old one, has not ratified the new one. *The War and International Law*, in *Deutschland und der Weltkrieg* (Eng. trans.), p. 604. See also De Visscher, *Belgium's Case*, p. 66.

<sup>3</sup> The preamble to convention IX states that one of its objects, among others, is to "harmonize for the common interest certain conflicting practices of long standing." So the preamble to convention XIII states that its purpose is to "harmonize the divergent views which are still held in respect to the relations between neutral and belligerent powers" and "to anticipate the difficulties to which such divergence of views gives rise."

<sup>4</sup> *La Guerre Sud-Africaine au point de vue du Droit International*, p. 219.

ference, speaking of the act which it formulated and which in its essential parts was approved by the Hague Conference and embodied in its conventions, remarked that it "has no other end than to consecrate rules universally admitted." Martens expresses the same view.<sup>1</sup>

The Hague conferences did not repeal the existing body of war law and substitute a new code in its place. They confined their efforts to defining and stating in precise rules the established usages and the best practice of the past. To maintain, therefore, that the essential parts of the Hague conventions of 1907 were not binding because the conventions were never formally ratified by all the powers in accordance with the procedure specified, is to hold that the larger body of well-established and universally accepted rules of war is without obligatory force. The provisions of the Hague conventions which are merely declaratory of the existing law and practice were therefore no less binding than that other large portion of international law which the Hague conferences did not attempt to define and embody in the conventions which they adopted.

Although not technically binding as conventions, only in rare instances did any belligerent during the recent war take advantage of this circumstance to avoid the obligations which they impose, and in all the controversies among the belligerents themselves and between them and neutrals, the rights and privileges established by the conventions were constantly invoked wherever they were applicable.<sup>2</sup> Indeed, in a number

<sup>1</sup> *La Paix et la Guerre*, p. 240.

<sup>2</sup> In the case of the *Appam* (*infra*, § 567) the German ambassador at Washington argued that art. 21 of the Hague convention concerning the rights and duties of neutral powers in naval warfare, which relates to the admission of prizes into neutral ports, was not binding and could not therefore be invoked by the British government, because Great Britain had not ratified the convention in accordance with art. 28. (Com. to the American Sec'y of State, February 22, 1916, *European War*, No. 3, p. 334.) Counsel for the British government, on the other hand, argued that art. 21 was merely declaratory of the existing law as recognized by the United States and the other nations generally and was therefore as binding as any other established customary rule of the law of nations. (Brief of counsel, p. 7.) Somewhat inconsistently, however, the German ambassador, while rejecting this contention, argued that art. 23 permitting the sequestration of prizes in neutral ports, the ratification of which had been reserved by Great Britain, the United States, and other powers, and which, according to his argument in respect to art. 21, was not binding, was nevertheless binding because it was merely declaratory of the customary law of nations. In any case, it is not clear how the failure of one of the belligerents to ratify an article of the con-



of instances belligerent states in their declarations of war announced their intention to conform to the conventions, provided their adversaries would do likewise.<sup>1</sup> At the outbreak of the war the minister of foreign affairs of Chili announced that the rules of neutrality that would be observed by Chili were those established by the Hague conferences, although the neutrality conventions (Nos. V and XIII) of 1907 had never been ratified by the Chilian government. The government of Chili would regard the conventions as binding because they embodied "the principles of international law universally recognized."<sup>2</sup>

The policy of the German government, however, was not vention would affect the rights and duties of a neutral power. In its correspondence with the British government regarding interference with the mails on neutral steamers the German foreign office recognized the binding force of convention XI and invoked the benefits of its provisions; but in its correspondence with the Norwegian government, which protested against the seizure by the German naval authorities of letter mail on certain neutral ships, the German government defended its policy on the ground that neither this nor any other of the conventions of 1907 were binding, since they had not been ratified by six of the belligerents. In a controversy between the French and Swedish governments the Swedish minister at Paris declared that convention XIII could not be regarded as binding, because it had not been ratified by all the powers. If this were true, none of them were binding. Consequently, in the controversy between Great Britain and Sweden regarding British interference with neutral mails the British government, adverting to the Swedish attitude referred to above, declined to regard the convention as binding between the two countries. At least the Swedish government could not demand that Great Britain should observe them in a war with Germany. (Sir Edward Grey to Count Wrangel, Swedish minister at London, January 31, 1916. *Brit. Parl. Paper Misc.*, No. 28 (1916), Cd. 8332, p. 9.) In its controversy with the United States regarding mail seizures Sir Edward Grey called the attention of the American government to the fact that convention XI had not been ratified by six of the belligerents and that for this reason Germany had denied its obligatory character. Consequently it was of doubtful validity, although the allied governments in dealing with mails on neutral steamers were guided by the intentions clearly expressed at the Hague Conference. (Memorandum of the Allied governments, October 12, 1916. *Parl. Paper* No. 2 (1917), Cd. 8438, p. 4.) In a controversy with the Dutch government in 1916 regarding the internment of the crew of a British submarine the British government contended that convention X was not binding, because it was not ratified by all the belligerents and could not therefore be invoked by the Dutch government. The Dutch government, however, maintained that the provision in question (art. 13) was merely declaratory of the existing law of nations and as such was binding on all the belligerents.

<sup>1</sup> See for example the Austro-Hungarian declaration of war against Serbia of July 28, 1914, and the French declaration of war against Germany of August 4, 1914.

<sup>2</sup> Text of the communication of the minister of foreign affairs, August 7, 1914, in Alvarez, *La Grande Guerre Européenne et la Neutralité du Chili*, pp. 157-158.

always consistent. Whenever it had occasion to invoke the benefits of a particular convention, it argued that the convention was binding; but whenever it wished to avoid its obligations, it took the position that the convention was not binding.<sup>1</sup> German jurists, in their efforts to justify such acts as the invasion of Belgium and the bombardment of undefended coast towns, usually resorted to this technical argument.<sup>2</sup> They argued, for example, that the fifth convention respecting the rights and duties of neutral powers in war on land, articles 1 and 2 of which relate to the inviolability of neutral territory, was not binding upon Germany, because Great Britain and certain other belligerent powers had not ratified it. The argument is of course without weight for the reason that the articles relating to the inviolability of neutral territory do not enunciate a new rule of law, but are merely declaratory of a long-established and universally admitted principle of international law.<sup>3</sup> This is admitted by Professor Zitelmann of the University of Bonn, who, speaking of the binding effect of the customary rules of law which have been expressly embodied in non-ratified inter-

<sup>1</sup> The German government in its reply of November 7, 1914, to the protest of the British government concerning the alleged breaches by Germany of the convention in respect to mines, while contending that the convention was not formally binding because Russia had not ratified it, stated that "nevertheless the German government of its own free will considers itself as bound by it." The Germans, for example, frequently invoked art. 23 of the convention respecting the laws and customs of war, relating to the access of enemy nationals to the courts, although they sought to avoid their own obligations under other conventions by claiming that they were not in force.

<sup>2</sup> For example, von Liszt in the *Dresdener Anzeiger*, September 23, 1914, and in the *Berliner Tageblatt* of February 10, 1915. Cf. also von Mach in the *New York Times* of November 1, 1914; also the *Norddeutsche Allgemeine Zeitung* of November 14, and the *Kölnische Zeitung* of December 14, 1914. The last mentioned paper in its issue of December 16, 1916, defended the bombardment of English coast towns on the ground that the convention was not binding. But as Scott justly remarks, the naval bombardment convention of 1907 is only declaratory of the existing law of nations and was therefore binding on all the belligerents, irrespective of whether they had all ratified it or not. *Amer. Jour. of Int. Law*, Vol. II, p. 291.

<sup>3</sup> Furthermore, at the time the violation of Belgium took place none of the non-ratifying belligerent powers were in a state of war with Germany, and therefore the "general participation clause" was inapplicable. It should also be said that the reservations of England were made only to arts. 16, 17, and 18 and did not touch arts. 1 and 2. Cf. De Visscher, *Belgium's Case, A Juridical Inquiry*, p. 63. The British manual of military law states that the convention is binding on Great Britain, "as on the whole they merely record the customary law of war on the subject."

national conventions, remarks that the formal non-validity of such conventions "is scarcely of importance." "For in large measure," he adds, "it was not intended by the [Hague] conventions to make new law, but rather to formulate the existing law, deciding at the same time questions in dispute and adding improvements. The formal non-validity of a convention is, therefore, no proof that its contents are not valid law, just the same. *A rule is not to be considered invalid because it is formulated in a convention which itself is not formally recognized as in force.*" Nevertheless he maintained, and very properly, that none of the conventions of 1907, in so far as their provisions were not declaratory of the existing customary law, had any formal validity or binding force.<sup>1</sup> It may be remarked that the German Supreme court of Military Justice in August, 1915, in a decision holding that an Englishman interned in Germany was not a prisoner of war in the sense of the Hague convention respecting the laws and customs of war, affirmed that the convention was in force in consequence of its acceptance by Germany and was therefore binding upon the court. The court added that it was no argument to say that it had not been ratified by all the belligerents in accordance with article 2. "The German government not having changed its point of view, and the principles established by the conference being the result of agreement in the matter of public international law, the convention conserved its force."<sup>2</sup>

<sup>1</sup> *The War and International Law*, in *Deutschland und der Weltkrieg* (Eng. trans. *Modern Germany*, p. 604); also *Archiv für öff. Recht*, Bd. 35, p. 1. Cf. also Strupp, *Gegenwartsfragen des Völkerrechts*, in Niemeyer's *Zeitschrift für Internationales Recht*, 1915, pp. 342-343, and in the *Zeitschrift für Völkerrecht*, Bd. IX, pp. 281-297, who assumes that arts. 1 and 11 of Hague convention II were binding on Germany, although the convention was not ratified by all the belligerents. Dr. Ernst Neukamp in an article in the *Juristen Zeitung* (reproduced in the *New York Times* of October 9, 1916), discussing the seizure of mails on neutral steamers, pointed out that convention XI was not binding upon any of the belligerents, nor could neutrals invoke its provisions in their controversies with belligerents. Professor von Liszt in the *Frankfurter Zeitung* of October 29, 1916 (*Clunet*, 1917, 911 ff.), remarks that convention IV was not legally binding on any of the belligerents; nevertheless he adds, since most of its provisions are merely declaratory of the customary law, they were in fact binding. So convention XI, in so far as its provisions are merely declaratory of the existing law, were binding on the Empire, and the supreme military court of Germany so affirmed in a decision of February 9, 1916.

<sup>2</sup> Text in *Juristische Zeitung*, 1916, p. 136. French trans. in *Clunet*, 1917, pp. 257 ff.

Some of the Hague conventions of 1907 provide that they may be denounced by any of the contracting parties by giving notice, but no such notice appears to have been given by any belligerent during the war. The contention was put forward by some German jurists at the time of the invasion of Belgium that the neutrality convention (No. V) was terminated by the outbreak of the war; but this contention was wholly inadmissible, because it is well settled that international conventions for the regulation of the conduct of the contracting parties during war are not affected by the outbreak of war, otherwise it would be useless for States to enter into such conventions.

§ 18. **Attitude of the Prize Courts in Respect to the Binding Force of the Hague Conventions.** Moreover, the prize courts of the various belligerent powers generally treated the conventions as if they were legally in force, and in the determination of cases involving the claims of enemy subjects they accorded them the benefits of rights claimed under any of the conventions, provided the State of which they were citizens or subjects were a party thereto.

The question whether convention VI of 1907 relating to the status of enemy merchant vessels at the outbreak of war was binding on the British prize court was considered at length by Sir Samuel Evans in the case of the *Mörve*, decided November 9, 1914.<sup>1</sup> Although strictly speaking, he said, it was not clear that the convention was binding on the court, nevertheless, acting in pursuance of the authority conferred on him by the order in council establishing the prize courts and the commission issued to the judges to determine cases "according to the course of admiralty and the law of nations," he would direct that any alien enemy who claimed a right or an immunity under any of the Hague conventions should be allowed to appear and to argue his case before the court. Moreover, in determining the liability to capture of German merchant vessels in English ports Sir Samuel Evans applied those articles of the convention which Germany had ratified without reservation, and he issued decrees of detention when he might have issued decrees of condemnation, had he been disposed to regard the convention as not being in force. On the other hand, he refused to accord German claimants the benefit of article 3 and para-

<sup>1</sup> Trehern, *British and Colonial Prize Cases*, Vol. I, p. 60.

graph 2 of article 4 of the said convention, which provide that merchant vessels encountered on the high seas in ignorance of the outbreak of hostilities and having left their last port of departure before the commencement of the war, shall merely be detained until the war ends instead of being condemned as prize, because Germany had reserved her ratification of those provisions of the convention.<sup>1</sup> The French council of prizes adopted a similar view as to the binding force of convention VI.<sup>2</sup>

Sir Samuel Evans, in the case of the *Möwe*, took occasion to express the opinion that the failure of a few petty States to ratify the Hague conventions ought not to be allowed to defeat the purpose of a great series of international engagements which had received the approval of practically all the important powers of the world. On this point he said:

"It is not my function or province to do anything more than to declare the law. But I trust to be forgiven for an humble expression of opinion that it would accord with the traditions of this country if such steps were taken as may be necessary to make operative a series of conventions solemnly agreed upon by the plenipotentiaries of forty-five States or powers after most careful deliberation, with the most beneficent international objects."

"Of the belligerents," he continued, "Montenegro has no navy, and, so far as I know, no merchant marine; it has a coastline, but only of about thirty miles; and Serbia is purely an inland State, having no seaboard at all. It would scarcely seem desirable that the non-ratification by these powers should prevent the application of the maritime conventions; and it may be that the counsellors who have the responsibility of advising the crown may deem it fit to advise that by proclamation or otherwise this country should declare that it will give effect to the conventions, whether by the literal terms thereof they may be strictly binding or not."<sup>3</sup>

<sup>1</sup> This matter is considered more at length in § 109.

<sup>2</sup> Cf. the French cases cited below, § 113.

<sup>3</sup> In the case of the *Fenix* (*Zeitschrift für Völkerrecht*, Bd. IX, No. 1, p. 103) the German Imperial supreme prize court (December 17, 1914) expressed the opinion that the failure of a few petty powers like Servia and Montenegro to ratify Hague convention VI did not stand in the way of its application by Germany, since they were not maritime States, nor did the fact that Great Britain and Russia reserve their ratification to certain parts of it have any such effect. The court interpreted art. 6 of the convention, which declares that its provisions do not apply except between the contracting parties and then only if all the belligerents are parties, to mean that it shall not apply only when the non-ratifying belligerents are maritime States. The convention was therefore treated as binding upon the court because, with the exception of art. 3, it had been ratified by the German government. The court even intimated that it would have been binding whether ratified by Germany or not, since its provisions merely embodied the the generally recognized principles of international law.

The British prize court at Alexandria, Egypt, adopted substantially the same view in a similar case. Considering the question whether convention VI was binding on the court, Judge Cater said:<sup>1</sup>

"There is no explicit legislation upon the subject, but I have come to the conclusion that the difficulty has been surmounted indirectly inasmuch as the order in council establishing prize courts, and the commissions to judges issued thereunder, require the judges to determine causes '*according to the course of admiralty and the law of nations*,' and it can hardly be disputed that the Hague conventions, to which the United Kingdom is a party, must so far as we are concerned, be deemed to be a part of the law of nations for the time being. . . . I am consequently prepared to hold that the court is bound by the Hague convention No. VI."<sup>2</sup>

"There is no doubt that the Hague convention has received such assent from the chief civilized States of Europe and that it is an international law promulgated by virtue of agreement of such States; therefore, I have no hesitancy in coming to the conclusion that we are bound in this case to take into consideration the first paragraph of article 2 of the Hague convention No. VI of 1907."

§ 19. **The Status of Maritime Law in 1914.** While the result of the Hague and Geneva conferences was to define and codify many of the rules of international law governing the conduct of war on land, the law of maritime warfare was left for the most part undefined and unwritten. Indeed, an English jurist had gone so far as to assert that international maritime law was "a chaos of separate treaties and of conflicting usages and practices," a situation which was clearly revealed in the discussions at the Hague Conference of 1907.<sup>3</sup> The Second Hague Conference, it will be recalled, had adopted a convention for the creation of an international prize court, article 7, paragraph 2 of which provided that in case questions of law not covered by treaty were presented to the court, it should apply the "rules of international law," and if no generally recognized rule existed, the court should give judgment in ac-

<sup>1</sup> *The Barenfels*, decided January 21, 1915. Trehern's Cases, Vol. I, p. 122.

<sup>2</sup> Adverting to the argument of the procurator that Germany might refuse to observe the convention and therefore Great Britain was not bound by it, Judge Cater went on to say that "it is quite true that in the last resort the rules of international law are based on reciprocity, and if the crown could produce evidence that Germany had flagrantly broken her bargain respecting the treatment of British ships, I conceive that we should be justified in moulding our practice according to her example. But the mere suspicion that she will break her word ought not to affect our judgment now."

<sup>3</sup> Cohen, *The Declaration of London*, p. 8.



cordance with the "general principles of justice and equity." But there was, as stated above, a considerable divergence of opinion and practice as to what were the established rules of maritime law in respect to various matters, and the results of the Russo-Japanese war had impressed British public opinion with the danger to which Great Britain would be exposed by having the liability of her ships to capture determined by a prize court which might apply rules of international law not recognized in Great Britain.

It was also well known that the proposed prize court would be composed of judges a majority of whom would be the representatives of States whose national interests and traditional opinions were opposed to those of Great Britain, and it was therefore to her interest that an agreement should be reached among the maritime powers as to what were the generally recognized principles of international law which the proposed prize court was charged with applying. More and more it became evident that the greater the uncertainty as to what the law was, the more unlimited would be the power of the court and the greater the danger to which British interests would be exposed in case of a war to which she was a party.<sup>1</sup>

§ 20. **The London Naval Conference (1908-1909) and the Declaration of London.** The British government, therefore, took the initiative in calling a conference with a view to reaching an agreement in regard to those matters "as to which divergent rules and principles have been enforced in the prize courts of different nations." The invitation was accepted, and in December, 1908, thirty-seven delegates representing Austria-Hungary, France, Germany, Great Britain, Italy, Japan, The Netherlands, Russia, Spain, and the United States assembled in London and adopted a Declaration of seventy-one articles concerning the laws of naval warfare. The Declaration contains a statement that the rules adopted "correspond in substance with the generally recognized principles of international law." These rules deal with such matters as contraband, blockade, continuous voyages, destruction of

<sup>1</sup> Cf. Stockton, *Amer. Jour. of Int. Law*, Vol. III, p. 596; also Higgins, *The Hague Peace Conferences*, pp. 567-568; Bowles, *The Declaration of London, Nineteenth Century and After*, Vol. LXV (1909), p. 744, and Cohen, *The Declaration of London*, p. 8.

neutral prizes, unneutral service, and transfers of flag. An agreement was reached on all points mentioned in the programme except that relating to the legality of the conversion of merchant vessels into warships on the high seas and the question as to whether the nationality or domicile of the owner should be the test in determining the enemy or neutral character of property. By article 66 the signatory powers engaged to insure the mutual observance of the rules contained in the Declaration in any war in which all the belligerents were parties thereto, and to that end they agreed to issue the necessary instructions to their authorities and armed forces and to take such measures as would be required to insure that its rules would be applied by their courts and, more particularly, by their prize courts.

§ 21. **Status of the Declaration of London.** According to article 67 of the Declaration the ratifications were to be deposited in London, and according to article 65 it was to be treated as a whole, that is to say, piecemeal ratification was not permitted for the obvious reason that it would be improper to allow a government to accept the provisions which were most favorable to its interests and to reserve acceptance of those which consist mainly of concessions.<sup>1</sup> The Declaration was accepted by the British government, but it was not generally approved by public opinion in England. A bill embodying its provisions passed the House of Commons on December 7, 1911, but it was thrown out by the House of Lords. The Italian government, although never having formally ratified it, proclaimed it to be in effect on October 13, 1912, for the war with Turkey, and it was applied by the Italian prize courts.<sup>2</sup> Turkey, though not represented at the Conference, likewise put the Declaration into effect and applied its provisions in the war with Italy.

The United States Senate on April 24, 1912, advised and consented to the ratification of the Declaration, but the ratifications had not been deposited in London when the recent war broke out. The result was that not one of the powers represented at the Conference had at the outbreak of the war

<sup>1</sup> Cf. Bentwich, *The Declaration of London*, p. 124. The reason for this requirement is well stated in Renault's Report. Cf. also Cohen, *The Declaration of London*, pp. 15-16.

<sup>2</sup> Cf. the cases of the *Vasilios* and the *Aghios Gorghios*. *Rev. Gén. de Droit Int.*, Vol. XX (1913), p. 652.



ratified the Declaration in accordance with the procedure prescribed, and consequently none of the belligerents were bound by the instrument as a whole. Animated by a desire to see it observed by the various belligerents, the secretary of state of the United States on August 6, 1914, instructed the American ambassador at London to inquire of the British government whether it was willing to apply the Declaration during the existing war provided Great Britain's adversaries would agree to do likewise. The secretary of state added that the acceptance of the rules of the Declaration by the various belligerents would "prevent grave misunderstandings" which might arise between them and neutrals, and he hoped that the inquiry would receive favorable consideration. A similar inquiry was addressed to the governments of Russia, the German Empire, Austria-Hungary, France, and Belgium. The Austro-Hungarian government replied that it had instructed its naval forces to observe the Declaration provided Austria-Hungary's enemies observed it. The German government replied that it would apply the Declaration provided its provisions were not disregarded by the other belligerents. The British government replied on August 22 that it had decided "to adopt generally the rules subject to certain modifications and additions which they judge indispensable to the efficient conduct of their naval operations." Aside from these modifications and additions His Majesty's government would, without waiting to learn the intentions of the enemy governments, adhere to the rules of the Declaration.<sup>1</sup> The French government agreed to observe the Declaration subject substantially to the same modifications and additions as those made by England, and the Russian government returned a similar answer. By a decree of March 25, 1917, the Italian government put the Declaration, except articles 22, 24, and 28, into effect with modifications of other articles similar to those made by Great Britain and France.

**§ 22. Application of the Declaration during the Late War.** These offers of piecemeal ratification were not, however, in accordance with article 65 of the Declaration and were, there-

<sup>1</sup> By an order in council of August 20, 1914, the Declaration, subject to certain modifications and additions to be discussed hereafter, was proclaimed to be in effect. It was put into effect by France with the same modifications by a decree of November 7.

fore, unacceptable to the American government. In a telegram of October 22, 1914, to the above-mentioned embassies and legations, the secretary of state withdrew the suggestions of the American government that the Declaration be adopted as a temporary code of naval warfare to be observed by belligerents and neutrals during the war, and announced that the American government would "insist that the rights and duties of the United States and of its citizens in the present war be defined by the existing rules of international law and the treaties of the United States, irrespective of the provisions of the Declaration of London," and that "this government reserves to itself the right to enter a protest or demand in each case in which those rights and duties so defined are violated."<sup>1</sup>

Orders in council modifying various articles of the Declaration were issued by the British government on October 29, 1914, October 20, 1915, and March 30, 1916, and the French and Russian governments appear to have introduced similar modifications so as to conform their action to that of Great Britain. At the outset, articles 22, 24, and 28 were modified by orders putting on the list of conditional contraband various articles which are on the free list in the Declaration of London and by putting on the list of absolute contraband other articles which are on the list of conditional contraband in the Declaration.<sup>2</sup> Article 33 was modified by the substitution of a new rule which provided that the destination referred to therein might be inferred from sufficient evidence (in addition to the presumption laid down in article 24) and should be presumed to exist if the goods were consigned to or for an agent of an enemy State or to or for a merchant or other person under the control of the authorities of the enemy State. Article 35 was modified by an order in council which provided that, notwithstanding the provisions of that article, vessels bound for neutral ports, if the goods were consigned "to order" or if they showed a consignee in enemy territory, should be liable to capture, and the onus of proving an innocent destination was placed on the owner of the goods, thereby extending the

<sup>1</sup> Cf. the correspondence relating to the matter in a white book issued by the Department of State in May, 1915, entitled *Diplomatic Correspondence with Belligerent Governments Relating to Neutral Rights of Commerce*, pp. 5-8. Cf. also *International Law Topics* for 1915, pp. 93 ff.

<sup>2</sup> Discussed in § 496-7.

doctrine of continuous voyage to the carriage of conditional contraband, contrary to the rule of the Declaration of London.<sup>1</sup>

Likewise the rule of the Declaration (article 19) which forbids the application of the doctrine of continuous voyage in respect to blockade was altered so as to authorize the capture of vessels bound to non-blockaded ports.

In October, 1915, the governments of the Entente allies announced that article 57 of the Declaration, which lays down the rule that "the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly," should no longer be regarded as in force and that henceforth the prize courts should apply the rules and principles formerly observed in such courts. The objection to article 57 was that it protected from capture ships flying neutral flags, but which in fact were owned wholly or in part by persons of enemy nationality. The particular reason for abrogating the article was to enable British and French prize courts to condemn certain merchant vessels flying the American flag, but in the ownership of which German subjects held a preponderating interest.<sup>2</sup>

**§ 23. Abrogation of the Declaration by Great Britain and France.** Lord Lansdowne avowed in the House of Lords in December, 1915, after the abrogation of article 57, that the Declaration was "dead as an instrument of international obligation."

The finishing touch was given by an order in council of July 7, 1916, following the decision of the privy council in the *Zamora* case that the prize courts were not bound by orders in council which were contrary to international law. This order revoked the order in council of August 20, 1914, by which the Declaration, subject to certain modifications and additions, had been proclaimed to be in force. The order in council withdrawing the Declaration announced that it was and always had been the intention of His Majesty's government and that of his allies "to exercise their belligerent rights at sea in strict accordance with the law of nations" and that, whereas "on account of the changed conditions of commerce and the diversity of practice doubts might arise in certain matters as to the rules which

<sup>1</sup> Concerning the status of the Declaration during the late war cf. two articles in 43 *Clunet*, pp. 1552 ff., and 44 *Clunet*, pp. 531 ff.

<sup>2</sup> Discussed in § 134.

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His Majesty and his allies regard as being in conformity with the law of nations," it was expedient to lay down the rules that would be observed in respect to certain matters. The order then proceeded to state the rules that would be applied in respect to the presumption of hostile destination, the doctrine of continuous voyage, and the liability of contraband to capture. In a note addressed to neutral governments the British government recited at length the reasons why Great Britain and her allies had decided to withdraw the Declaration.

"At the beginning of the present war," the note went on to say, "the Allied governments, in their anxiety to regulate their conduct by the principles of the law of nations, believed that in the Declaration of London they would find a suitable digest of principles and compendium of working rules. They accordingly decided to adopt the provisions of the Declaration, not as in itself possessing for them the force of law, but because it seemed to present in its main lines a statement of the rights and duties of belligerents based on the experience of previous naval wars. As the present struggle developed, acquiring a range and character beyond all previous conceptions, it became clear that the attempt made at London in time of peace to determine, not only the principles of law but even the form under which they were to be applied, had not produced a wholly satisfactory result. As a matter of fact, these rules, while not in all respects improving the safeguards afforded to neutrals, do not provide belligerents with the most effective means of exercising their admitted rights.

"As events progressed, the Germanic powers put forth all their ingenuity to relax the pressure tightening about them and to reopen a channel for supplies; their devices compromised innocent neutral commerce and involved it in suspicions of enemy agency. Moreover, the manifold developments of naval and military science, the invention of new engines of war, the concentration by the Germanic Powers of the whole body of their resources on military ends, produced conditions altogether different from those prevailing in previous naval wars."

The rules of the Declaration, it was added, could not stand the strain imposed by the test of rapidly changing conditions and tendencies, and the allied governments had been forced to recognize the situation thus created and to adapt those rules from time to time to meet new conditions. These modifications may have exposed the allies to misconstruction and consequently they had come to the conclusion that they must "confine themselves simply to applying the historic and admitted rules of the law of nations." Nevertheless they would not without cause interfere with neutral property; and if they should, by the action of their fleets, cause damage

to the interests of any merchant acting in good faith, they would always be ready to consider his claims and to grant to him such redress as might be due.<sup>1</sup>

§ 24. **To what Extent was the Declaration Binding?** This action by the Entente allies made the Declaration of London as an instrument a dead letter, but what was said of the Hague conventions may be said equally of the Declaration, namely, that many of its stipulations were not new rules but were merely declaratory of the existing customary law and were therefore as binding upon belligerents as any other well-settled customary rule of international law. The preamble to the Declaration, indeed, expressly declared that the signatories were agreed that the rules contained therein correspond in substance with the generally recognized principles of international law. The essential portions are to be found in the existing German, French, and Austro-Hungarian prize codes, and they were applied by the British prize courts except where modifications had been made by orders in council. Thus in the case of the *Katwyk*<sup>2</sup> Sir Samuel Evans said he thought it would be right to act on the principles of the Declaration, apart from its binding effect.<sup>3</sup> In all the prize cases involving provisions of the Declaration, it was relied upon by counsel, was frequently quoted, and was generally treated as though it were in force, notwithstanding the fact that it had not been ratified in accordance with the procedure prescribed by articles 65 and 67. Germany, as is well known, again and again justified certain

<sup>1</sup> British White Paper, Misc. No. 22 (1916), Cd. 8293.

<sup>2</sup> Trehern's *British and Colonial Prize Cases*, vol. I. p. 206.

<sup>3</sup> In the case of the *Kim*, however, Sir Samuel Evans ruled that those portions (Arts. 29, 35-36) which had been modified by orders in council were not binding on the court and must be disregarded. *Ibid.*, p. 427. Article 35, which excludes the application of the doctrine of continuous voyage to the carriage of conditional contraband was, he said, an innovation in international law, and the British order in Council of Oct. 19, 1914, modifying it, was not in contravention of the existing law. In the case of the *Hakan* (Trehern's *Cases*, II, 210), Sir Samuel denied the truth of the assertion in the preamble that the rules of the Declaration corresponded in substance with the generally recognized principles of international law. Art. 40, which allows condemnation of the vessel only when the contraband goods constitute more than half the cargo, was, he said, an innovation and constituted a mitigation of the ancient rule which allowed condemnation of the vessel if it carried contraband in any proportion. Cf. also an article entitled "The Legal Position of the Declaration of London," by Mr. R. F. Roxburgh in the *Jour. of the Soc. of Comp. Leg.*, July, 1915, pp. 72 ff., where it is pointed out that the Declaration contains various new rules of international law.

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of her measures of retaliation on the ground of the non-conformity of Great Britain to the provisions of the Declaration.<sup>1</sup> At the outbreak of the war the minister of foreign affairs of Chili announced that since the rules of the Declaration corresponded in substance to the generally recognized principles of international law on the points with which they deal, the Chilean government would apply them not as conventional law but as principles of international law at present in force, as the Italian government had done in 1911-1912.<sup>2</sup> To say, therefore, that the Declaration as a whole was a dead letter is to ignore the assumption upon which governments and prize tribunals in fact proceeded throughout the war. In truth, no government repudiated the Declaration as a whole; even Great Britain and France, although revoking the orders by which it had been put into effect, did not repudiate such of its provisions as were generally accepted as international law.

<sup>1</sup> Cf. an article entitled "The Status of the Declaration of London," by C. G. Phillimore, in the *Journal of the Society of Comparative Legislation*, July, 1915, pp. 233. For the attitude of England toward the Declaration see an article in the *London Solicitors' Journal and Weekly Reporter* for July 8, 1916, pp. 600 ff.

<sup>2</sup> Alvarez, *op. cit.*, pp. 157-158.

## CHAPTER II

### *THE BELLIGERENTS; TREATMENT OF ENEMY DIPLOMATIC AND CONSULAR REPRESENTATIVES AFTER THE OUTBREAK OF WAR*

§ 25. The Peoples at War; § 26. List of Belligerents; § 27. Treatment of Enemy Diplomatic Representatives following the Outbreak of the War; § 28. Treatment of the British Ambassadors to Germany and Austria-Hungary; § 29. Treatment of the French and Russian Ambassadors to Germany; § 30. Treatment of the German Ambassador at London; § 31. Treatment of the French Minister to Luxemburg; § 32. Departure of the British Ambassador from Constantinople; § 33. Treatment of the American Ambassador at Berlin; § 34. Treatment of Consular Representatives in Germany; § 35. Alleged Maltreatment of Austrian, German, and Turkish Consuls; § 36. Detention of Enemy Consuls after the Outbreak of War; § 37. Arrest and Deportation of Enemy Consuls in Greece; § 38. Status of Enemy Diplomatic Consular Representatives in Occupied Territory; § 39. Care of Belligerent Interests by Neutral Embassies and Legations.

§ 25. **The Peoples at War.** The late war was unprecedented in the history of the past by reason of the large number of belligerents which participated in it at one time or another, either actively or by declaration unaccompanied by actual hostilities. From first to last, thirty States or recognized belligerent powers, constituting about two-thirds of all the independent States of the world, were engaged actually or legally in the titanic contest. Their aggregate population totalled approximately two billion persons, of whom some forty million are said to have been under arms at one time or another. Arrayed against some or all of the four Central powers (Germany, Austria-Hungary, Bulgaria, and Turkey) were the following States: Albania, Belgium, Brazil, China, Costa Rica, Cuba, the Czecho-Slovaks, France, Great Britain, Greece, Guatemala, Haiti, Honduras, Italy, Japan, Liberia, Montenegro, Nicaragua, Panama, Portugal, Roumania, Russia, San Marino, Servia, Siam, and the United States. Each one of these powers, except San Marino, appears to have been at war with Germany; but only Great Britain, Greece, France,



Italy, Russia, and Servia appear to have been at war with all of Germany's allies. No state of war was ever declared between Belgium and Bulgaria, nor between any of the South American republics and Germany's allies except Austria-Hungary. The double rôle of belligerent in respect to one power and of neutral in respect to its allies was anomalous and in some cases broke down in practice, as was proven by the attempt of Germany and Italy to preserve for a time a pacific attitude toward each other when Germany's chief ally (Austria-Hungary) was engaged in the war against Italy.<sup>1</sup> In a number of instances diplomatic relations were broken off without being followed by a declaration of war. Thus the United States severed relations with Turkey; Belgium with Bulgaria; and Bolivia, Ecuador, Peru and Uruguay with Germany.

§ 26. **List of Belligerents.** The following is a list of the belligerents and the dates on which each declared war or recognized the existence of a state of war.<sup>2</sup>

1. Austria-Hungary — Servia ..... July 28, 1914
2. Germany — Russia ..... August 1, 1914
3. Germany — France ..... August 3, 1914
4. Germany — Belgium ..... August 4, 1914
5. Great Britain — Germany ..... August 4, 1914
6. Austria-Hungary — Russia ..... August 6, 1914
7. Servia — Germany ..... August 6, 1914
8. Montenegro — Austria-Hungary ..... August 7, 1914
9. Montenegro — Germany ..... August 9, 1914
10. France — Austria-Hungary ..... August 12, 1914
11. Great Britain — Austria-Hungary ..... August 12, 1914
12. Japan — Germany ..... August 23, 1914

<sup>1</sup> In a number of instances hostilities were actually begun before formal declarations of war were made. This was the case between Austro-Hungary and Japan; between Turkey and Russia; and between Bulgaria and Servia.

In June 1916 before Italy had declared war against Germany, the German Imperial Court rendered a decision in which it stated that although no formal state of war then existed between the two countries it was necessary to admit that in consequence of Germany's alliance with Austria-Hungary which was at war with Italy, Germany was in fact at war with Italy. It is said that German war ships flying the Austrian flag were at the time engaged in conducting naval operations against the Italian naval forces. 43 *Clunet*, 1701.

<sup>2</sup> In each case the State first mentioned declared war upon the State mentioned second. The United States Department of State from time to time issued lists of the nations at war, with the date when each became a belligerent. (The last one issued was published in the *Official Bulletin* of November 7, 1918.) A list giving different dates in some instances and containing summaries and statistical data may be found in 25 *Rev. Gén. de Dr. Int. Pub.*, 85 ff.



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13. Austria-Hungary — Japan . . . . . August 27, 1914
14. Austria-Hungary — Belgium . . . . . August 28, 1914
15. Russia — Turkey . . . . . November 3, 1914
16. Great Britain — Turkey . . . . . November 5, 1914
17. France — Turkey . . . . . November 6, 1914
18. Belgium — Turkey . . . . . November 6, 1914
19. Servia — Turkey . . . . . December 2, 1914
20. Italy — Austria-Hungary . . . . . May 23, 1915
21. San Marino — Austria-Hungary . . . . . June 3, 1915
22. Italy — Turkey . . . . . August 21, 1915
23. Bulgaria — Servia . . . . . October 14, 1915
24. Russia — Bulgaria . . . . . October 18, 1915
25. France — Bulgaria . . . . . October 18, 1915
26. Great Britain — Bulgaria . . . . . October 19, 1915
27. Italy — Bulgaria . . . . . October 19, 1915
28. Germany — Portugal . . . . . March 9, 1916
29. Austria-Hungary — Portugal . . . . . March 15, 1916
30. Roumania — Austria-Hungary . . . . . August 27, 1916
31. Italy — Germany . . . . . August 28, 1916
32. Germany — Roumania . . . . . August 28, 1916
33. Turkey — Roumania . . . . . September 1, 1916
34. Bulgaria — Roumania . . . . . September 1, 1916
35. The United States — Germany . . . . . April 6, 1917
36. Panama — Germany . . . . . April 7, 1917
37. Cuba — Germany . . . . . April 7, 1917
38. Brazil — Germany . . . . . October 26, 1917
39. Greece — Bulgaria . . . . . July 2, 1917
40. Greece — Austria-Hungary . . . . . July 2, 1917
41. Greece — Turkey . . . . . July 2, 1917
42. Siam — Austria-Hungary . . . . . July 22, 1917
43. Siam — Germany . . . . . July 22, 1917
44. Liberia — Germany . . . . . August 4, 1917
45. China — Germany . . . . . August 14, 1917
46. China — Austria-Hungary . . . . . August 14, 1917
47. The United States — Austria-Hungary . . . . . December 7, 1917
48. Greece — Germany . . . . . July 2, 1917
49. Panama — Austria-Hungary . . . . . December 10, 1917
50. Cuba — Austria-Hungary . . . . . December 16, 1917
51. Guatemala — Germany . . . . . April 21, 1918
52. Nicaragua — Austria-Hungary . . . . . May 6, 1918
53. Nicaragua — Germany . . . . . May 6, 1918
54. Costa Rica — Germany . . . . . May 24, 1918
55. Hayti — Germany . . . . . July 15, 1918
56. Honduras — Germany . . . . . July 19, 1918

To this long list should be added Albania, whose position in the war was somewhat anomalous. Soon after the outbreak of the war its territory was occupied by the Greeks, Servians,

and Montenegrins. Later the Servians and Montenegrins were driven out by the Austro-Hungarian forces, and the Greeks were expelled by Italian and French forces. The French and Italians appear to have been greeted by the Albanians as liberators, and they thereupon took the side of the Entente powers and joined with them in the prosecution of the war against the Central powers. Finally it may be added that in the summer of 1918 the governments of the United States, Great Britain, France, and Italy recognized the Czecho-Slovaks as a belligerent power.<sup>1</sup>

§ 27. **Treatment of Diplomatic Representatives following the Outbreak of War.** On account of the intense bitterness and excitement which prevailed in some of the capitals at the outbreak of the war, the diplomatic and consular representatives of enemy powers were subjected to discourteous treatment and even to gross indignities, in violation of the customary immunities. Practically all writers on international law hold that diplomatic representatives are entitled by a long-established customary rule of the law of nations to have their diplomatic immunities and privileges respected after the rupture of diplomatic relations and until they have had a reasonable time to withdraw from the enemy country and return to their own land.<sup>2</sup> During this period they are entitled to protection and respect, and it is customary to provide special facilities

<sup>1</sup> Their territory consisted of a broad belt stretching across the northern part of the dual monarchy and embracing Bohemia, Moravia, Silesia, and a part of Hungary. Their government consisted of a "national council" with headquarters in a foreign country and at the head of which was a "president." Many of the Czecho-Slovaks were of course fighting in the Austrian armies; those who were fighting on the side of the Entente powers formed three "armies": one in Siberia, one in France, and another in Italy. The act of recognition on the part of the United States contained the following passages: "The government of the United States recognizes that a state of belligerency exists between the Czecho-Slovaks thus organized and the German and Austro-Hungarian Empires. It also recognizes the Czecho-Slovak national council as a de facto belligerent government, clothed with proper authority to direct the military and political affairs of the Czecho-Slovaks. The government of the United States further declares that it is prepared to enter formally into relations with the de facto government thus recognized for the purpose of prosecuting the war against the common enemy, the Empires of Germany and Austria-Hungary."

<sup>2</sup> Cf. Oppenheim, *International Law*, Vol. II, p. 107; Wheaton, *International Law*, 3d ed., p. 353, and Pradier-Fodéré, *Traité de Droit International*, Vol. VI, p. 674. Fiore seems to be the only writer who maintains that the outbreak of war terminates the privileges and immunities of diplomatic representatives. *Traité de Droit Int.*, § 1290.

for their transportation to the frontier of the country from which they are withdrawing.<sup>1</sup> If, of course, a minister insists on remaining in the enemy's country longer than is reasonably necessary for him to withdraw, he loses his diplomatic immunities and may be made a prisoner of war.

§ 28. **Treatment of the British Ambassadors to Germany and Austria-Hungary.** Upon the eve of the outbreak of the recent war, excited crowds in several instances assembled in front of the enemy legation or embassy buildings and engaged in noisy and insulting demonstrations.<sup>2</sup> Sir Edward Goschen, British ambassador at Berlin, relates that on the evening of August 4, 1914, a flying sheet having been issued by the *Berliner Tageblatt* stating that Great Britain had declared war against Germany, "an excited and unruly mob" assembled before the British embassy.

"The small force of police which had been sent to guard the embassy," he says, "was soon overpowered, and the attitude of the mob became more threatening. We took no notice of this demonstration as long as it was confined to noise, but when the crash of glass and the landing of cobble stones into the drawing-room, where we were all sitting, warned us that the situation was getting unpleasant, I telephoned to the foreign office an account of what was happening. Herr von Jagow at once informed the chief of police, and an adequate force of mounted police, sent with great promptness, very soon cleared the street. From that moment on we were well guarded, and no more direct unpleasantness occurred.

"After order had been restored Herr von Jagow came to see me and expressed his most heartfelt regrets at what had occurred. He said that the behaviour of his countrymen had made him feel more ashamed than he had words to express. It was an indelible stain on the reputation of Berlin.

"On the following morning, the 5th August, the Emperor sent one of His Majesty's aides-de-camp to me with the following message:—

"The Emperor has charged me to express to your Excellency his regret for the occurrences of last night, but to tell you at the same time that

<sup>1</sup> Cf. Pillet, *Les Lois Actuelles de la Guerre*, p. 72. The only instance in former wars of the maltreatment of a retiring diplomatic representative at the outbreak of hostilities, of which I am aware, was the insulting and pelting with mud of the Japanese minister to China by a disorderly detachment of soldiers at the outbreak of the Chino-Japanese war in 1894. The Chinese government, however, promptly expressed regret and punished the offenders. T. E. Holland in Littel's *Living Age*, Vol. 206, p. 70.

<sup>2</sup> Such a demonstration took place in front of the Russian embassy at Berlin on the evening of July 26, 1914, upon receipt of the news that the Austrian army had mobilized. The Russian chargé d'affaires in reporting the incident to his government stated that "hardly any police were present and no precautions were taken." Russian Orange Book, No. 30.

you will gather from those occurrences an idea of the feelings of his people respecting the action of Great Britain in joining with other nations against her old allies of Waterloo. His Majesty also begs that you will tell the King that he has been proud of the titles of British Field-Marshal and British Admiral, but that in consequence of what has occurred he must now at once divest himself of those titles.'

"I would add that the above message lost none of its acerbity by the manner of its delivery."<sup>1</sup>

Aside, however, from some insulting gestures and jeering by the crowds which thronged the platforms at the railway stations, the ambassador's long and tedious journey to the Dutch frontier was without incident.<sup>2</sup> Sir Maurice de Bunsen, British ambassador at Vienna, had a somewhat similar experience. A special train was put at the disposal of the embassy staff, and aside from stone throwing and hooting by the crowds at the railway stations they were subjected to no inconveniences or indignities. The Russian ambassador at Vienna, M. Schebeko, was likewise provided with a special train and reached Switzerland safely and without inconvenience, although his request to be conveyed to the Roumanian frontier in order that he might proceed more directly to his own country was not granted.<sup>3</sup>

§ 29. Treatment of the French and Russian Ambassadors to Germany. The French and Russian ambassadors at Berlin, however, appear to have been treated with less consideration than their colleagues at Vienna. M. Jules Cambon, in a special report to his government,<sup>4</sup> states that on the morning of August 3, an excited crowd thronged the Pariser Platz in front of the embassy and made a demonstration. At six o'clock in the evening an official of the foreign office brought his passports and

<sup>1</sup> James W. Gerard, the American ambassador, relates in his book, *My Four Years in Germany* (p. 138), that on the evening of August 4, learning of the attack upon the British embassy, he made his way through the crowd which choked the Wilhelmstrasse and offered the protection of his own embassy to Sir Edward Goschen, who politely declined the offer.

<sup>2</sup> Sir E. Goschen says that an official of the German foreign office consulted him regarding the route which he wished to take. A special train equipped with a restaurant was put at his disposal, a colonel of the guards accompanied the train to the Dutch frontier, a representative of the foreign office came to the station to say good-by on behalf of Herr von Jagow, and everything possible was done to provide for the comfort and safety of the embassy staff. *British Diplomatic Correspondence*, pp. 112-114.

<sup>3</sup> *Ibid.*, p. 118.

<sup>4</sup> Dated August 6, 1914, and found in the French Yellow Book, No. 155.

informed him that his request to be permitted to travel by way of Holland or Belgium had been refused by the government. The officer then asked him to leave as soon as possible and suggested that he should go either by way of Copenhagen (although he could not guarantee a free passage by sea) or through Switzerland by way of Constance. The ambassador chose the latter route, and it was agreed that, in view of the necessity of making arrangements with the Spanish ambassador, who had consented to take charge of French interests in Germany, he might stay in Berlin until 10 P.M. the following day. An hour later another officer came to ask that he request the staff of the embassy to cease taking meals in the restaurants. The order was so strict that the ambassador was obliged to obtain permission from the foreign office for a hotel to send meals to his staff. Later in the evening he was informed that the government had decided not to allow the staff of the embassy to return to France by way of Switzerland, as it would require three days and nights to make the journey and that accordingly they would be sent by way of Vienna. Against this decision M. Cambon protested on the ground that it involved the risk of his being detained there and that in consequence he must ask the German government for a promise on its honor that the Austrian government would send him on to Switzerland and that the Swiss government would not close its frontier to him or the persons by whom he was to be accompanied. Unless this assurance were given, he could not accept the German proposal. The next morning this assurance was given in writing, but at the same time an attaché of the French consulate at Berlin as well as other Frenchmen were arrested in their own homes.

As the ambassador was preparing to leave for Vienna, an official of the German government came to inform him that he would have to go by way of Denmark. Asked if, in case he refused, he would be confined in a fortress, the officer merely replied that he would return in half an hour to receive his reply. Not wishing to give the German government a pretext for saying that he had refused to leave by the route designated, the ambassador informed the officer that he would submit under protest. M. Cambon then addressed a letter to Herr von Jagow calling attention to the assurances which had been given

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him that in accordance with the usages of international courtesy the usual facilities for his return journey would be allowed. Now at the last moment it had been decided to send him to Denmark, from which country there was no assurance that, in view of the existing situation, he would be able to find a ship to take him to France. No liberty had been allowed him, and in truth he was being treated as though he were a prisoner, to all of which he submitted under protest.

At ten o'clock in the evening the ambassador left the embassy accompanied by a great assembly of foot and mounted police, and at the station he was met by an inferior official of the foreign office. His journey to the frontier is thus described by him:

"I was accompanied by major von Rheinbaben of the Alexandra regiment of the guard and by a police officer. In the neighborhood of the Kiel canal the soldiers entered our carriages. The windows were shut and the curtains drawn down; each of us had to remain isolated in his compartment and was forbidden to get up or to touch his luggage. A soldier stood in the corridor of the carriage before the door of each of our compartments which were kept open, revolver in hand and finger on the trigger. The Russian chargé d'affaires, the women and children and everyone were subjected to the same treatment. At the last German station I thought that our troubles had finished when shortly afterwards major von Rheinbaben came, rather embarrassed, to inform me that the train would not proceed to the Danish frontier if I did not pay the cost of the train. I expressed my astonishment that I had not been forewarned of this. I offered to pay by a cheque on one of the largest Berlin banks. This facility was refused me. With the help of my companions I was able to collect in gold the sum which was required from me at once, and which amounted to 3,611 marks, 75 pfennig. This is about 5,000 francs in accordance with the present rate of exchange."<sup>1</sup>

The Russian ambassador at Berlin was likewise subjected to insults and indignities during the course of his departure from Germany. In a report to the ministry of foreign affairs he asserted that the authorities at Berlin were either unwilling or unable to protect the embassy from insults from the mob which gathered in front of the ambassador's residence. They were not only insulted, it was charged, but actually assaulted and beaten by the crowd while in their carriages en route to the station.<sup>2</sup>

<sup>1</sup> Subsequently the sum thus exacted from M. Cambon was returned through the medium of the Spanish ambassador.

<sup>2</sup> James W. Gerard, American ambassador at Berlin, says that he sent his automobile to take the Russian ambassador to the station, and his chauffeur

§ 30. **Treatment of the German Ambassador at London.** Prince Lichnowsky, German ambassador to Great Britain, thus describes his departure from England at the outbreak of the war.

"Our departure was put through in a thoroughly dignified, quiet way. The King had previously sent his equerry, Sir E. Ponsonby, to express his regret that I was leaving and that he could not himself see me. Princess Louise wrote to me that the whole family was sorry that we were going away. Miss Asquith and other friends came to the embassy to take leave.

"A special train took us to Harwich. There a guard of honor was drawn up for me. I was treated like a departing sovereign. Such was the end of my London mission. It was wrecked, not by the wiles of the British, but by the wiles of our policy."<sup>1</sup>

§ 31. **Treatment of the French Minister to Luxemburg.** M. Mollard, French minister to Luxemburg, likewise complained of discourteous treatment at the hands of the German authorities after their occupation of the grand duchy. On August 4 he was requested to leave Luxemburg as quickly as possible and proceed to France, otherwise the military authorities would be under the painful necessity of placing him under the observation of a military escort and in the last resort of arresting him.

In view of the neutralized status of Luxemburg, M. Mollard protested and yielded only to force in order to avoid creating a disturbance which would lead to demonstrations and reprisals upon Frenchmen by the German military authorities. He left in a motor car preceded by a German officer, and followed the route prescribed for him by the German authorities.<sup>2</sup> In thus compelling the French minister to leave Luxemburg, a neutral State, the German authorities proceeded on the theory that, having invaded and occupied the country, it was in a sense German territory, and hence diplomatic representatives of enemy powers could not be permitted to remain there. The Belgian minister to Luxemburg was required to leave for the same reason.<sup>3</sup>

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and footman reported that the automobile was nearly overturned by the crowd and that several persons jumped upon the running board and struck the ambassador and the ladies with him in their faces with sticks. *Op. cit.*, p. 133.

<sup>1</sup> *My Mission to London*, p. 38 (Geo. H. Doran and Company, N.Y., 1918).

<sup>2</sup> M. Mollard to M. Doumergue, French minister of foreign affairs, French Yellow Book, No. 156.

<sup>3</sup> Second Belgian Grey Book, No. 41.



§ 32. **Departure of the British Ambassador from Constantinople.** Sir Louis Mallet, British ambassador to Turkey, states that he and his French and Russian colleagues got away without being subjected to serious inconveniences or insult, but owing to the "wanton" refusal of the military authorities at the last moment to allow the departure of a large number of British and French subjects who were to have left by an earlier train, the station was the scene of "indescribable confusion and turmoil." The protests of the British and French ambassadors were without avail, and after protracted discussion it was agreed to leave matters in the hands of the American ambassador, who promised to use all his influence to procure the departure of the British and French.<sup>1</sup>

It does not appear that the retiring diplomatic representatives of any of the Central powers were maltreated or subjected to insults or indignities of any kind, although the German embassy building at St. Petersburg was destroyed by a mob on the evening of August 4, 1914.<sup>2</sup>

§ 33. **Treatment of the American Ambassador at Berlin.** When diplomatic relations between the governments of the United States and Germany were broken off in February, 1917, the German ambassador at Washington was promptly furnished his passports, the American government employed its good offices to obtain from the British and French governments a safe conduct for his voyage,<sup>3</sup> and it reserved accommo-

<sup>1</sup> Cf. *Ambassador Morgenthau's Story*, ch. 12; also despatch of His Majesty's Ambassador at Constantinople regarding events leading up to the rupture of relations with Turkey. *Misc.*, No. 14 (1914), Cd. 7716. The Turkish government was charged with having expelled in June, 1915, the dragomans of the American and Italian embassies as an act of reprisal for the alleged expulsion by the British government of Turkish officials who were left in London in charge of the archives of the Turkish embassy.

<sup>2</sup> "The German embassy was completely wrecked by the mob, not a single article of furniture being left undestroyed. Everything was smashed into the smallest possible pieces and thrown into the street. Actually nothing was saved, even the iron railing of the stairway, the bath-tubs and doors being smashed to pieces. All the glass in the window frames was ripped out and smashed up. Therefore in its present state nothing but the outer and inner walls exist." See a German White Paper entitled *Denkschrift über die Behandlung der Deutschen Konsuln in Russland und die Zerstörung der Deutschen Botschaft in Petersburg*, p. 15.

<sup>3</sup> After the dismissal of Dr. Dumba, the Austro-Hungarian ambassador at Washington, in 1917, the American government requested the British and French governments to issue a safe-conduct through their blockade lines to his successor,



dations on a steamship for him and his staff. Every possible courtesy appears to have been shown the departing ambassador by the American government, all due arrangements were made for his safe return to Germany, and no hostile demonstrations occurred during the course of his journey from Washington to the port of embarkation.

The conduct of the American government formed a striking contrast to the treatment which the American ambassador received at the hands of the German government. The ambassador's passports were withheld for more than a week after they had been requested, during which time he was detained in Berlin, virtually as a hostage, without being allowed to use the telegraph or telephone, or to receive mail, and in all his movements he claims to have been followed by spies. The action of the German government appears to have been due to the belief, widely current in Germany, that the German ambassador to the United States was being detained and that the crews of German vessels in American ports had been arrested and were being kept in confinement.<sup>1</sup> Neither report, however, had any foundation. Mr. Gerard also complained that Count Montgelas, a high official of the foreign office, endeavored

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Count Tarnowski. At first the request was refused, but upon reconsideration it was granted, and the new ambassador arrived safely in the United States. The American government was reported to have based its request upon the right of sovereign nations to exchange diplomatic representatives and upon the rule that a belligerent has no lawful right to prevent an enemy from sending such a representative to a neutral government. Perhaps it would be more accurate to say that it is a matter of international comity rather than of international right. On this subject Oppenheim remarks, however, that "it must be specially observed that diplomatic agents sent by the enemy to a neutral State make an exception to the rule that neutral vessels may be punished for carrying agents sent by the enemy. The reason is that neutrals have a right to demand that their intercourse with either belligerent shall not be suppressed and that the sending and receiving of diplomatic agents is necessary for such intercourse." The question involved was somewhat different from that of the *Trent*, since Mason and Slidell were the commissioners of a belligerent power but not the ambassadors of a State whose independence had been recognized. The difference, however, was hardly fundamental. The British government at the time protested not on the ground that diplomatic immunities had been violated but on the ground of interference with neutral commerce.

<sup>1</sup> Count von Reventlow, in an editorial in the *Tages Zeitung* of February 19, 1917, made the charge that the American ambassador was using his official position to transmit important military information to the Entente governments and this charge appears to have been made by other German newspapers. But there was no foundation for it.

to induce him to agree to a revised draft of the old treaty of 1799 between the United States and Prussia or to cable his government for authority to do so. This Mr. Gerard refused to do and expressed surprise and indignation that he, virtually a prisoner, should be urged to enter into negotiations and be subjected to pressure such as the German government was attempting.<sup>1</sup>

**§ 34. Treatment of Consular Representatives in Germany.** Numerous complaints were also made of the maltreatment of enemy consuls after the outbreak of the war. Consular representatives cannot, of course, claim the same privileges and immunities that are allowed diplomatic representatives; nevertheless the rules of international comity and courtesy have long accorded them special protection and respect, and they have secured certain privileges and immunities by treaties and by the municipal legislation of many countries.<sup>2</sup>

The Russian government charged that its consular representatives in various German cities, notably those at Stettin, Königsberg, Danzig, and Breslau, were grossly maltreated and that in some instances they were beaten and imprisoned. Some were even stripped of their clothing and had their money taken away from them.

M. Armez, French consul at Stuttgart, in an official report describing the treatment to which he was subjected on August 5, 1914, on the occasion of his departure from Germany, alleged that he was deprived of the use of the telegraph and post office and that his mail was opened by the German military authorities "in the interest of military necessity." Upon protesting to the German minister of foreign affairs, he was informed that he had no right to carry on correspondence in any language except German. He alleged furthermore that he was thrown into prison and later expelled. When he was released and allowed to leave, an officer came aboard the train at the first station and arrested him on the charge of being a spy. During the course of the excitement which followed, one of the passengers in the compartment put a pistol to his head, and an attempt was made to throw him out of the car. He was struck on the head, his passports were taken from him,

<sup>1</sup> See his book *My Four Years in Germany*, p. 382.

<sup>2</sup> See, for example, § 72 of the United States consular regulations.

and his watch was broken. The arrival of the police saved him from still rougher treatment.<sup>1</sup>

The French Consul at Düsseldorf states that on August 10 he was waited on by two officers with revolvers in hand and informed that he must leave Germany at once. Two men were left at his door, and when he went on the streets he was followed by them. He was not allowed to enter a café or restaurant or to read the war notices on the bulletin boards. While entering an automobile he was attacked by three men who attempted to take his life, but the intervention of the police saved him. Upon his return to the consulate a mob appeared before the door shouting, "Down with France!" "Down with Russia!" "Hurrah for Germany!" etc. He was thereupon hurried to a train and sent away. During the course of his journey he was subjected to numerous insults by mobs at the railway stations. When he arrived at the last station on the German frontier, he was thoroughly searched by men with revolvers in hand, and his papers were taken away with the promise that they would be restored to him when he returned to Düsseldorf.<sup>2</sup>

§ 35. **Alleged Maltreatment of Austrian, German, and Turkish Consuls.** The Austro-Hungarian government, in a document entitled "collection of evidence concerning violations of international law by countries at war with Austria-Hungary," likewise alleged that its diplomatic and consular officers, notably those in Italy, France, and Morocco, were treated in a manner contrary to "the most elementary rules of the right of hospitality, a right consecrated since the remotest antiquity and respected even by uncivilized nations or tribes." "Never before," it added, "have so many cases of the violation of this right been instanced. In several cases the illegal expulsion or arrest has preceded the actual state of war, a fact which still aggravates the offence. The expulsion of the Austro-Hungarian diplomatic agents from Morocco and Egypt, which is irreconcilable with existing international treaties, has been made the subject of protests lodged with the neutral powers."

The German Government made similar charges in respect

<sup>1</sup> See the text of his report in 22 *Rev. Gén. de Droit Int. Pub.* (1915), Documents, pp. 63-65.

<sup>2</sup> Text of his Report, *ibid.*, pp. 70-73.

to the treatment of its consular representatives in Russia, particularly those at Vladivostok, Moscow, Warsaw, Vilna, Kovno, and Tiflis. Some of them are alleged to have been arrested, thrown into prison, photographed, measured, their finger prints taken, deprived of their money and effects, and in general subjected to the treatment usually applied to common criminals.<sup>1</sup>

The Turkish government likewise complained that the treatment to which its consuls were subjected in Russia and Persia was in violation of the law of nations. As a measure of retaliation the Turkish government forbade the departure from its territory of Russian consuls after the outbreak of the war. They were then sent into the interior and notified that they would be allowed to leave only when Russia accorded reciprocity of treatment. Similar treatment was meted out to British and French consuls.<sup>2</sup>

§ 36. **Detention of Enemy Consuls after the Outbreak of War.** After the outbreak of the war between Great Britain and Germany the consuls of each government were detained by the other and forbidden to leave the country.<sup>3</sup> Subsequently, however (March, 1915), an agreement was reached between the two governments under which consuls *de carrière* as well as honorary consuls were exchanged on a man-for-man basis.<sup>4</sup>

Many American consuls in Germany were detained for a considerable period after the severance of diplomatic relations between the two countries, and some were released only after the American government had vigorously protested against the

<sup>1</sup> Cf. the German White Paper entitled *Denkschrift über die Behandlung der Deutschen Konsuln in Russland und die Zerstörung der Deutschen Botschaft in Petersburg*.

<sup>2</sup> Text of the Declaration of the Turkish ministry, November 27, 1914, in 22 *Rev. Gén. de Droit Int. Pub.* (1915), Docs., p. 94.

<sup>3</sup> It appears that each government allowed the consuls of the other to leave up to the declaration of war, but few succeeded in getting away. In a despatch received at the American embassy on October 6, 1914, the German government complained that the British government had acted at variance with the principles of international law in arresting and detaining the German vice-consul at Cape Town; that the Canadian government had refused safe-conducts to the German consuls at Montreal and Winnipeg; that the German honorary consul at Wari, Nigeria, had been forced to leave without a safe-conduct; that a German consular secretary in Malta had been arrested and held as a prisoner, and that the German consuls at Sunderland, Manchester, and West Hartlepool had been arrested on the charge of treason.

<sup>4</sup> Correspondence between His Majesty's government and the U.S. Ambassador Respecting the Exchange of Diplomatic and Consular Officers. *Misc.* No. 8 (1915), Cd. 7857.

conduct of the German authorities and had demanded their immediate release. Complaint was also made that in some cases American consuls with their wives were stripped and subjected to the acid test before being allowed to leave. German consular officials in the United States were permitted to depart freely, and the American government procured safe-conducts for their return to Germany.<sup>1</sup>

§ 37. **Arrest and Deportation of Enemy Consuls in Greece.** An incident in connection with the occupation of Saloniki by the British and French forces was the arrest and deportation to Toulon, France, by order of the French general, Sarrail, of the Austrian, German, Bulgarian, and Turkish consuls. The Greek government protested against the act as a flagrant violation of the sovereignty of Greece, and the governments by whom the consuls were accredited denounced it as an act contrary to international law. The Entente governments defended the action of General Sarrail on the ground that their forces were in occupation of Saloniki with the consent of Greece and that the consuls of the enemy powers mentioned had remained within the Anglo-French lines where they had organized a system of espionage and communicated military information to the Bulgarian forces with a view to facilitating aerial attacks upon the occupying forces. Considerations of self-protection, therefore, made it necessary that the consuls should be removed from the town.<sup>2</sup> In January following they were released through the good offices of the American government upon condition that they would not resume their functions in Sa-

<sup>1</sup> The German government refused for some time after the severance of diplomatic relations to permit four American consular officials who had been transferred to Turkey, to leave Germany, because the American government would not undertake to procure safe-conducts for certain German consular officials in the United States to travel to the posts to which they had been transferred in Latin America. The American government had, as stated above, obtained safe-conducts for German consular officials to return to their own country, but it regarded the German demand for safe-conducts for its consular representatives to proceed to new posts in Latin America as unprecedented and one with which it could not comply.

<sup>2</sup> See an article in the *Law Times* of London, January, 1916, p. 229. The consular papers seized are alleged to have contained evidence of a vast conspiracy against the allies, and the Austrian consulate is said to have been a veritable arsenal of munitions and guns. Cf. also an article by M. Clunet in the *Journal de Droit Int.*, 43: 527 ff. M. Clunet examines the law and practice and concludes that the Anglo-French authorities were entirely within their rights in arresting and deporting those involved in the conspiracy.

loniki and would return to the countries which they represented.<sup>1</sup> After the outbreak of the war between Bulgaria and Great Britain in October, 1915, the Bulgarian government ordered the arrest of British and French consuls in that country in retaliation for the arrest of Bulgarian consuls in Greece. The British vice-consul at Sofia took refuge in the American legation after learning of the arrest of his French colleague. The Bulgarian government having demanded his surrender, the chargé of the legation cabled to Washington for instructions. He was informed that unless it could be shown that the vice-consul's life was in danger, the legation would not be justified in giving him asylum.

§ 38. **Status of Enemy Diplomatic and Consular Representatives in Occupied Territory.** The removal of the Belgian government from Brussels to Havre in France and the occupation of most of Belgium by the German forces raised the question whether the foreign legations at Brussels should be permitted to remain there or required to follow the Belgian government to Havre. It appears that in fact only the Spanish and American ministers remained, and although they were permitted by the German government to reside in Brussels notwithstanding the German occupation and the flight of the Belgian government to a foreign country, there was some complaint in the German press that the American minister in particular was allowed to continue his residence and to exercise his functions at Brussels, and it was reported in the press despatches at various times that it was the intention of the German government to compel him to leave, as most of the other legations had done, — this on the principle that a foreign diplomatic representative has no right to remain in a country which has fallen under the military occupation of the enemy and from which the government to which he is accredited has withdrawn.<sup>2</sup>

<sup>1</sup> The German and Austro-Hungarian consuls in Mytilene were also arrested and deported to Toulon by the British and French military authorities, but they, too, were subsequently released and allowed to return to their countries. The release of the Austrian consul was brought about by the intervention of the American ambassador at Vienna, for which the Austrian government expressed its "sincerest thanks."

<sup>2</sup> On this theory the German government in February, 1915, annulled the exequaturs of the consuls of neutral governments residing in Belgium, it being held that exequaturs granted by the Belgian government were not binding on the military occupant. Consuls who were acceptable, however, were permitted



After the severance of diplomatic relations between the United States and Germany in February, 1917, the German authorities in Brussels immediately withdrew from him his diplomatic privileges and immunities. His courier service to The Hague was stopped, and he was denied the privilege of communicating with his government in cipher and later even in plain language. The American government did not, however, withdraw him, and the German authorities permitted him to remain and engage in the work of the Belgian relief commission. The German government even asserted that the flag on the building occupied by him was never hauled down and that he was allowed to receive telegrams freely. But on March 24, 1917, some two weeks before the outbreak of war between the United States and Germany, the American government instructed him to withdraw from Belgium with all diplomatic and consular officers. The minister with his staff and the members of the relief commission accordingly left Belgium and reached Berne on April 4, two days before the outbreak of war between the United States and Germany.

Upon the occupation of Bucharest, the capital of Roumania, by the armies of the Central powers early in 1915, the diplomatic representatives of neutral powers were required to leave the capital, this on the ground that "international law does not recognize the status of a diplomat accredited to the government of a country which is under the military occupation of another power."<sup>1</sup> They were, however, free to follow the Roumanian government to Jassy, which became the temporary capital.

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to remain, provided they obtained new exequaturs from the German government. The American vice-consul at Belgrade was required to leave Servia after its occupation by the Austro-Hungarian forces, but after some correspondence between the American and Austro-Hungarian governments regarding the matter the request of the American government that he be allowed to return was granted, subject to certain restrictions. Regarding the status of American consuls in belligerent countries cf. *Dip. Cor. with Belligerent Countries Relating to Neutral Rights and Duties, European War*, No. 3, pp. 359 ff.

<sup>1</sup> Herr Zimmermann, German secretary of state for foreign affairs, in an interview regarding the matter, stated that not only the representatives of neutral powers had been ordered to leave but also that the Austro-Hungarian minister had been withdrawn by his government. Being reminded that the American and Spanish ministers to Belgium had been allowed to remain after its occupation by Germany, he replied that it was only because governor-general von der Goltz had raised no objection, whereas in the case of the ministers to Roumania the military commander, general von MacKensen, considered it inadvisable to permit them to remain.

When the French government was transferred temporarily to Bordeaux in September, 1914, in consequence of the threatened occupation of Paris by the German armies, all the embassies and legations at Paris, except the embassy of the United States, followed the government to Bordeaux.<sup>1</sup> When the French government decided to move to Bordeaux, the American ambassador cabled his government for permission to remain in Paris, and he was instructed to use his discretion. He therefore decided to remain and "do what he could to protect from destruction the rich memorials and rare objects which belonged to the civilized world."

§ 39. **Care of Belligerent Interests by Neutral Embassies and Legations.** Following the practice in recent wars, the various belligerent governments upon the rupture of diplomatic relations turned over the archives of their embassies and legations and intrusted the care of their interests in enemy countries to the embassies or legations of friendly neutral powers.<sup>2</sup> In the majority of cases this duty of protection was intrusted to the American representatives.<sup>3</sup> In some instances, however, it was confided to the representatives of neutral European powers. Thus the Spanish embassy at Berlin took over the protection of the interests of Belgian, French, Russian, and Portuguese nationals remaining in Germany. Likewise the Spanish em-

<sup>1</sup> Some of them appear to have fled with undignified haste, and one minister, indeed, left contrary to the instructions of his government, for which he was replaced by another representative. Eric Fisher Wood, *The Note Book of an Attaché*, p. 57.

<sup>2</sup> This practice had already become a well-established custom. Thus during the Franco-German war of 1870 the American minister to France took over the protection of Germans in that country. During the Græco-Turkish war of 1897 the Greeks in Turkey were looked after conjointly by the diplomatic representatives of France, England, and Russia, the French representative taking charge of Roman catholics, those of England and Russia taking charge of the orthodox catholic adherents. During the Spanish-American war of 1898 the interests of American citizens in Spain were cared for by the British minister at Madrid, while those of Spanish subjects in the United States were intrusted to the joint protection of the French and Austro-Hungarian ministers.

<sup>3</sup> Until the breaking off of diplomatic relations with Germany in February, 1917, the representatives of the United States had charge of the interests of four of the Allied powers in Germany (Great Britain, Japan, Servia, and Roumania) and of five in Austria-Hungary (Great Britain, France, Italy, Japan, and Roumania). They also looked after the interests of Germany and Austria-Hungary in all the countries with which they were at war except Italy, Japan, and Portugal. At Constantinople the American embassy looked after the interests of nine of the belligerent nations.



bassy at Vienna took charge of Belgian, Servian, and Russian interests in Austria-Hungary, and the legation of the same government at Lisbon undertook the protection of German and Austro-Hungarian subjects in Portugal. German interests in Italy were looked after by the Swiss legation. The Swiss legation at Berlin undertook the care of Italian interests in Germany, and the Greek legation was intrusted with those of Montenegro. The care of Ottoman subjects in Belgium was intrusted to the Dutch minister at Brussels. The interests of the nationals of France, Russia, Great Britain, Italy and Servia in Bulgaria were confided to the legation of the Netherlands. When diplomatic relations between the United States and Germany were broken off in February, 1917, German interests in the United States were taken over by the Swiss legation and American interests in Germany by the Spanish ambassador at Berlin.<sup>1</sup>

The task which was thus imposed upon the diplomatic and consular representatives of some of the neutral powers was very heavy and made necessary a substantial increase in their staffs. This was especially true of the United States during the early weeks following the outbreak of the war.<sup>2</sup> In view of the delicate nature of the task thus assumed by the American government, the department of state issued a body of instructions for the guidance of its diplomatic and consular officials who were intrusted with the interests of foreign governments at war with the governments to which they were accredited. These instructions called their attention to the fact that they were to exercise no official functions but only their unofficial good offices; that they were not officers of the unrepresented government, and that they had no power to act officially as diplomatic or consular representatives of another government.<sup>3</sup>

In many instances the American representatives performed

<sup>1</sup> A complete list may be found in 22 *Rev. Gén.*, 222 ff. See also 44 *Clunet*, 569.

<sup>2</sup> Cf. an address by Secretary Lansing in the *Amer. Jour. of Int. Law*, April, 1915, p. 479. The duties which devolved upon the embassies and legations in Switzerland were also vastly increased. Before the outbreak of the war the total diplomatic personnel in Switzerland did not exceed eighty or ninety persons. By March, 1918, the number was more than three hundred. The German staff had increased from nine to forty; the Austro-Hungarian from seven to thirty; the French from seven to thirty-one; the American from three to sixteen, etc. *Journal de Genève*, March 11, 1918; *Clunet*, 45: 619.

<sup>3</sup> Text in *Amer. Jour. of Int. Law*, Vol. IX, Supp., pp. 118-119.

valuable services for the governments which they undertook to serve, and for these services expressions of gratitude were frequently made. This was notably the case with the American ambassadors at Berlin, London, Paris, and Constantinople, and with the American minister at Brussels. The American ambassador at Constantinople in particular was able to exert a restraining influence upon the Turkish authorities in respect to the treatment of alien enemies and to induce them to prevent outbreaks against the foreign population.<sup>1</sup> Likewise the American minister to Belgium rendered notable service in connection with the relief of the destitute population and used his good offices with the German military authorities on many occasions to secure lenient treatment of Belgians charged with offences against German authority.

<sup>1</sup> Sir Edward Grey in a communication of December 4, 1914, to Sir Louis Mallet, British ambassador at Constantinople, said: "I have read with great appreciation and pleasure of the invaluable assistance rendered to your excellency in the difficult circumstances of your departure by the United States ambassador and every member of the United States embassy, and I have already requested the United States government to convey to Mr. Morgenthau the most sincere thanks of His Majesty's government for the valuable services rendered by His Excellency on that occasion and subsequently in helping the British community to leave Constantinople." Likewise Sir E. Goschen, British ambassador at Berlin, in a report to Sir Edward Grey of August 8, 1914 (*British Diplomatic Cor.*, p. 5), took occasion to express his high appreciation for the valuable assistance rendered to him by the American ambassador and his staff at the outbreak of the war.

## CHAPTER III

### *TREATMENT OF ENEMY ALIENS; MEASURES IN RESPECT TO PERSONAL LIBERTY*

§ 40. Former Practice; § 41. Opinions of the Authorities; § 42. The Enemy Alien Problem of the Recent War; § 43. Who are Enemy Aliens? § 44. Early British Measures in Respect to Enemy Aliens; § 45. Proposed Exchange of Enemy Aliens; § 46. Final Agreement Reached; § 47. Early British Policy as to Internment; § 48. Mob Outbreaks; § 49. Demand for General Internment § 50. Policy of General Internment Adopted; § 51. Early Measures Adopted in France; § 52. General Internment in France; § 53. Agreement as to Exchange; § 54. Attitude of Public Opinion in France; § 55. Denationalization of French Citizens of German Origin; § 56. Early German Policy; § 57. General Internment in Germany; § 58. Status of Germans in Italy; § 59. The Portuguese Measure of Expulsion; § 60. Japanese Policy; § 61. Policy of the United States.

§ 40. **Former Practice.** Throughout the nineteenth century the general practice in respect to the treatment of enemy aliens was liberal and enlightened. In most of the wars which occurred during that period they were either allowed to continue their residence unmolested or to withdraw with their goods and effects, if they so elected. There were no instances of wholesale internment and, with a solitary exception, no confiscation of the private property of enemy nationals.

Upon the outbreak of the Franco-German war of 1870 both belligerents permitted enemy aliens to remain without molestation or to withdraw freely, this notwithstanding the fact that large numbers of such persons were subject to military service in their respective countries and might therefore have been justly detained. Later, in consequence of the German invasion and the siege of Paris, the French government issued a decree requiring all Germans to leave the department of the Seine as a measure of military necessity. The German government, however, regarded the expulsion as unjustifiable and exacted from France at the close of the war an indemnity of ten million francs as compensation for the alleged losses sustained by those

expelled.<sup>1</sup> But most writers approve the action of the French as a necessary military precaution.<sup>2</sup>

During the war of 1898 between the United States and Spain both belligerents allowed enemy aliens to reside within the national territory without molestation, although the President of the United States issued a warning to Spanish subjects that they were objects of suspicion and that their actions would be closely watched.<sup>3</sup> During the Chino-Japanese war of 1894 and the Russo-Japanese war of 1904-1905 enemy subjects (except Japanese in Manchuria) were allowed to remain and were unmolested so long as they demeaned themselves peaceably.<sup>4</sup> There have, however, been some instances of departure from this liberal policy. In 1868 the Turkish government expelled resident Greeks from the Ottoman Empire at the outbreak of the war between the two countries.<sup>5</sup> The Turkish government announced the same policy in 1897 during the Græco-Turkish war, but the order of expulsion was never put into effect. Again in 1911 during the war with Italy the same policy was followed by the Turkish government.<sup>6</sup> In 1879, during the war between Chili and Bolivia, the nationals of the former country were expelled from Bolivia and their property confiscated.<sup>7</sup>

During the South African war the government of the Transvaal ordered the expulsion of the English, but except at Johannesburg, it was not carried out strictly.<sup>8</sup> Finally, at the outbreak of the Russo-Japanese war of 1904 the Russian government expelled Japanese subjects from Manchuria and compelled them to leave without sufficient time to wind up their

<sup>1</sup> Bonfils, *Droit Int. Pub.*, § 1055.

<sup>2</sup> Even Treitschke (*Politics*, Vol. II, p. 610) justified in principle the action of the French. "In the national wars of the present day," he says, "every honest subject is a spy and therefore the expulsion of 80,000 Germans from France, in 1870, was not in itself a violation of the law, but was indefensible because it was carried out with a certain brutality." Geffcken (ed. of Heffter, note 4 to § 121) alleges that the expulsion of the Germans was due to French resentment on account of their early defeats.

<sup>3</sup> Benton, *International Law and Diplomacy of the Spanish-American War*, p. 120; Moore, *Digest*, Vol. V, p. 376.

<sup>4</sup> Takahashi, *International Law Applied to the Russo-Japanese War*, pp. 29-30; Spaight, *War Rights on Land*, p. 30.

<sup>5</sup> Rivier, *op. cit.*, Vol. II, p. 230.

<sup>6</sup> Coquet, *La Guerre Italo-Turque*, 19 *Rev. Gén. de Droit Int. Pub.*, p. 408.

<sup>7</sup> Rivier, *op. cit.*, Vol. II, p. 231.

<sup>8</sup> Spaight, *op. cit.*, p. 30; *Times History of the Boer War*, Vol. II, p. 125.

affairs and make other necessary preparations. However, Japanese subjects in Russia proper were permitted to remain and follow their peaceful callings without molestation.<sup>1</sup> During the recent war the only instance of wholesale expulsion appears to have been furnished by Portugal, whose government ordered the expulsion of all Germans except those of military age.

§ 41. **Opinions of the Authorities.** Writers on international law are now in substantial agreement that a belligerent ought not to detain enemy subjects, confiscate their property, or subject them to any disabilities further than such as the protection of the national security and defence may require. Vattel in 1758 appears to have been the first writer to adopt the view that had come to be generally held by publicists at the time the recent war broke out. "The Sovereign," he said, "who declares war, has not the right to detain the subjects of the enemy who are found within his State, nor their effects. They have come to his country in public faith; in permitting them to enter and live in the territory, he has tacitly promised them all liberty and surety for their return. A suitable time should be given them to withdraw with their goods; and if they stay beyond the time prescribed, it is lawful that they should be treated as enemies, though as disarmed enemies."<sup>2</sup> Westlake, in 1907, adverting to the numerous treaty stipulations on the subject, remarked that they might be deemed to amount to "a general agreement on the part of governments that modern international law forbids making prisoners . . . of enemy subjects in their territory at the outbreak of war, or, saving the right of expulsion in case of apprehended danger to the State refusing them the right of continuous residence during good behavior."<sup>3</sup>

Owing, however, to the recent introduction of universal compulsory military service on the continent of Europe there has been a growing disposition to recognize the right of belligerents to detain males liable to such service, in order to prevent them

<sup>1</sup> Hershey, *Int. Law and Diplomacy of the Russo-Japanese War*, p. 298; Oppenheim, *International Law*, Vol. II, p. 109; Ariga, *La Guerre Russo-Japonaise*, p. 37.

<sup>2</sup> *Droit des Gens*, Liv. III, ch. IV, § 63. Vattel adds that in his time it was the practice to allow enemy subjects a period in which to withdraw with their effects.

<sup>3</sup> *International Law*, Part II, p. 46.

from returning home and enlisting in the enemy's army. On account of their residence in the country and the opportunity thus afforded of acquiring more or less familiarity with its topography and the location of military forts, arsenals, munitions depots, the extent of its resources, and the like, their service would be of special value to their own country.<sup>1</sup>

The discussions at the Second Hague Conference make it quite clear that it was considered inadmissible to imprison enemy subjects at the outbreak of war; but it should be remarked that those discussions did not touch upon the question of the treatment of such persons who were reservists and who, if allowed to depart, would join the forces of the enemy.<sup>2</sup> While, as stated above, there is now a good deal of authority for the view that it is permissible to detain males of military age who are liable to service, there are writers who do not sympathize with the exception which it has been proposed to make to the general rule.<sup>3</sup>

When the recent war broke out, the status of enemy aliens had not been dealt with by any of the great international conventions further than the much controverted article 23*h* of the Hague convention of 1907 concerning the laws and customs of war on land, which, according to some authorities, makes it obligatory upon belligerents to allow such persons access to their courts. The treatment which must be accorded them, therefore, rested upon the customary law of nations and particular treaty stipulations.

**§ 42. The Enemy Alien Problem of the Recent War.** If the practice during the recent war was less liberal than that of other wars, it may be explained in part by the extreme bitterness and passion which animated almost all the peoples involved, and in part by the changed conditions resulting from the presence of large numbers of enemy aliens, many of whom were reservists, in the territories of the various belligerents at the outbreak of the war. This latter circumstance caused the

<sup>1</sup> Cf. Bonfils, *op. cit.*, § 1053, and Hall, *op. cit.*, 6th ed., p. 386. Other writers who defend the right to detain such persons are Calvo, *Droit Int. Pub.*, Vol. IV, p. 54; Lawrence, *op. cit.*, p. 390; Twiss, *Law of Nations*, Vol. II, § 50; Rivier, *op. cit.*, Vol. II, p. 230, and Liszt, *Das Völkerrecht*, § 39.

<sup>2</sup> Cf. Oppenheim in Roxburgh, *The Prisoners of War Information Bureau in London*, p. vii.

<sup>3</sup> Cf. Sir Ernest Satow in the *Pubs. of the Grotius Society*, Vol. II, p. 7, and Phillipson, *Int. Law and the Great War*, p. 30.

problem of dealing with such persons to assume an importance never before known in any previous war and greatly increased the difficulty of handling it with due regard to both the national defence and the heretofore recognized rights of the enemy alien population.

At the outbreak of hostilities there were more than fifty thousand German subjects residing in the United Kingdom,<sup>1</sup> besides about eight thousand naturalized British subjects of German origin, the latter of whom English public opinion scarcely differentiated from the former class. Besides, there was a considerable number of Austrian, Hungarian, and Ottoman subjects. In France the enemy alien population was much larger. According to Professor Valéry of Montpellier the total number of foreigners in that country was approximately one and one-half million, a large number of whom were enemy subjects.<sup>2</sup> The problem was less serious in Germany where there were only about fifty-three hundred British subjects in the country. The number of persons of French nationality residing there was somewhat larger, although greatly inferior to the number of Germans in France. The outbreak of the war between Italy and Germany found about thirty thousand Italian subjects in Germany and about fifty thousand Germans in Italy.

The situation in the United States was by reason of the very large number of German subjects in the country quite different from that in the countries of Europe, although owing to the geographical remoteness of America from the theatre of hostilities and its separation from the enemy country by the Atlantic ocean, the danger from the presence of so large an enemy population was less serious. On the other hand, the number of American citizens who remained in Germany after the outbreak of the war was very small, several hundred only.

The presence of enemy subjects in such large numbers, especially in England and France, constituted a serious problem, the danger of which was accentuated by the fact that a large proportion of such persons were reservists who had received military training and who, if they had been allowed to depart, would have returned home to serve in the armed forces of the enemy. The

<sup>1</sup> Sir Edward Grey to Mr. Page, November 9, 1914, *House of Commons, Ses. Papers, Misc.*, No. 8 (1915), Cd. 7837, p. 15.

<sup>2</sup> 23 *Rev. Gén. de Droit Int. Pub.*, (1916), 353.



problem of dealing with them in accordance with the more liberal practice of recent wars was further complicated by the existence in both countries, as in others where Germans resided in large numbers, of a highly organized and extensive system of espionage; for the Germans generally had acted in accordance with Treitschke's view referred to above, that "In the national wars of the present day every honest subject is a spy." Under these circumstances the public authorities of the countries situated in close proximity to Germany felt that the national security would be dangerously compromised by allowing the enemy alien population the same degree of freedom that had been generally accorded in the more recent wars of the past.

§ 43. **Who are Enemy Aliens?** The British order in council of August 5, 1914 (art. 31), defined an "alien enemy" as an alien "whose sovereign or State is at war with His Majesty the King." Such a person is distinguished from an "enemy" in a wider sense. Thus the Trading with the Enemy Proclamation No. 2 (1914) declared that the term "enemy" meant any person of *whatever nationality* resident in or carrying on business in an enemy country, but not persons of enemy nationality who were neither resident in nor carrying on business in the enemy country.<sup>1</sup> A British subject residing in Germany was therefore an enemy to Great Britain, at least for the purpose of trade and intercourse. In short, the test of enemy character for these purposes was domicile rather than nationality.<sup>2</sup> Such a person, when viewed from the stand-point of the State to which he owed allegiance, was regarded as an "enemy"; but viewed from the stand-point of the State in whose territory he resided, if it were a hostile power, he was an "enemy alien." Although the French have usually accepted the principle of nationality rather than domicile as the test of enemy character, the anomalous situation referred to above, in which a Frenchman residing in hostile territory was an "enemy" to his own country, was

<sup>1</sup> This view of the traditional British doctrine was affirmed by the court of appeal in *Porter v. Freudenburg* (1915, 1 K.B. 857).

<sup>2</sup> Likewise the American Trading with the Enemy Act of October 6, 1917, (§ 2) declared "any individual, partnership or other body of individuals of *any nationality* resident within the territory of any nation with which the United States is at war or resident outside the United States and having business within such territory" to be an "enemy."



created by the decree of September 27, 1914, which placed in the category of "enemies" not only the subjects of the Empires of Germany and Austria-Hungary, but also "all persons who resided in the territories of these Empires."<sup>1</sup>

While the term "enemy alien" embraced only persons within the national territory who owed allegiance to an enemy State, both Great Britain and France, in fact, made little distinction between such persons and naturalized subjects of enemy origin. The British Naturalization Act, however, declares that a naturalized subject is entitled to all political and other rights, powers, and privileges and is subject to all obligations which a natural born British subject is entitled or subject to in the United Kingdom, and that a British subject naturalized in a foreign country thereby loses his British nationality. Notwithstanding this provision, the British government during the recent war, without revoking the naturalization certificates held by British subjects of German origin resident in British territory, treated such persons as though they were in fact enemy aliens and interned them in detention camps along with unnaturalized aliens of enemy nationality. The French government adopted the same policy, but followed the more logical course of denationalizing naturalized French citizens of German origin who had procured their naturalization certificates subsequent to January 1, 1913.<sup>2</sup> The Portuguese government adopted a similar policy.

Certain provisions in the German Imperial citizenship law of July 22, 1913,<sup>3</sup> the so-called Delbrück law, raised a perplexing question as to the status of Germans naturalized in foreign countries as well as those unnaturalized but who claimed to have lost their German nationality. Section 25 of this law declares that "citizenship is not lost by any one, who before acquiring foreign citizenship has secured, on application, the written permission of the competent authorities of his home State to retain his citizenship." Provision was also made for the reinstatement to citizenship of Germans and their descendants who have acquired foreign citizenship. The effect of this law was believed to create a dual allegiance and was ap-

<sup>1</sup> Text in Reulos, *Manuel des Séquestrés*, p. 231.

<sup>2</sup> Dalloz, *Guerre de 1914*, T. IV, p. 114; and 42 Clunet, 129 ff. and 345 ff.

<sup>3</sup> English text in *Amer. Jour. of Int. Law*, July, 1914, Supp., pp. 217-227.

parently intended to conserve to Germany the allegiance and service of the large numbers of Germans who emigrate to foreign countries.<sup>1</sup> Two cases involving the status of Germans under this law were presented to the English courts during the late war. In the case of *ex parte Weber* (1916)<sup>2</sup> a person of German origin who had resided in England for many years and who had been arrested and imprisoned as an enemy alien, applied for a writ of *habeas corpus* alleging that he had no nationality, since he had lost his German nationality by long absence and had not acquired British nationality by naturalization. The court refused, however, to admit that under the terms of the Imperial citizenship law of 1913 he had lost his German nationality. Lord Reading said he was not satisfied that Weber's long absence had operated to deprive him of all his rights as a German subject and that if he returned to Germany he would not be held for military service. The facts and the decision in the case of *ex parte Liebmann*<sup>3</sup> were substantially the same. Under the terms of the law of 1913, said the court, "a former German could recover full German nationality without even going back to Germany at all"; it was clear therefore that the applicant had not become entirely divested of the rights belonging to a native-born German and therefore he was an enemy alien.

The Delbrück law raised similar difficulties in France, where numerous Germans claimed to have lost their German nationality and had become *heimathlos* by long absence from the fatherland and consequently sought to avoid the restrictions to which enemy aliens were subject. The French courts, however, did not look with favor on this plea, but took the position that the effect of the German law was to enable such persons to dissimulate their real nationality by claiming to be *heimathlos*, or to be German subjects, according as the one or other status might subserve their immediate interests.<sup>4</sup>

A still more perplexing question arose in every belligerent

<sup>1</sup> Cf. Flournoy, *Amer. Jour. of Int. Law*, 1914, pp. 477-486. This view, however, is denied by Thiesing in a learned article entitled "Dual Allegiance in the German Law of Nationality and American Citizenship," 27 *Yale Law Journal*, pp. 147-149 ff.

<sup>2</sup> *Law Times Reports*, Vol. 113, p. 968.

<sup>3</sup> *Ibid.*, p. 971.

<sup>4</sup> Cf. the cases of Reé and Schmidt in Troimaux, *Séquestres et Séquestrés*, pp. 99 and 103.

country in connection with the status of so-called mixed companies, that is, those composed in part of enemy shareholders or a portion of whose managing directorate were persons of enemy nationality. The general rule adopted was to treat such companies, whenever the preponderance of the shareholders or directors were enemy subjects, as enemy companies.<sup>1</sup>

#### BRITISH POLICY

**§ 44. Early English Measures in Respect to Enemy Aliens.** On August 3, 1914, the day following the outbreak of war between Germany and Great Britain, Parliament passed the Aliens Restriction Act<sup>2</sup> authorizing the government to impose by order in council certain restrictions on aliens residing within the United Kingdom, without distinction between those who were subjects of an enemy State and those who were subjects of friendly powers. The restrictions which the government was empowered to impose included prohibitions to land or embark in the United Kingdom; the power to deport aliens; to require them to reside in certain designated areas; to compel them to register, and to take any other measures which appeared "necessary or expedient, with a view to the safety of the realm." The Act prescribed appropriate penalties for violation of any order in council issued in conformity with the law and gave the courts summary jurisdiction of cases involving such violations. The Act further declared that the onus of proving that a person was not an alien should lie upon him, thus reversing the old English rule that the burden of proof rests upon the party charging the disability.<sup>3</sup>

On the same day an order in council entitled "the aliens restriction order" was issued in pursuance of the authority thus conferred, and it was followed by other supplementary and amendatory orders and instructions from time to time. Portions of the order applied to all aliens, friendly and enemy alike, but its main purpose was to restrict the liberty of those of enemy nationality only. The order designated certain "approved" places in England, Scotland, and Ireland at which aliens of

<sup>1</sup> I have treated this subject more at length in § 145, 152, 153.

<sup>2</sup> Text in Pulling's *Manual of Emergency Legislation*, pp. 6-8, and in Baty and Morgan, *War, its Conduct and Legal Results*, pp. 470-472.

<sup>3</sup> Cf. Bentwich in the *Amer. Jour. of Int. Law*, 1915, p. 644.

friendly powers were permitted to land and from which they were allowed to depart; but enemy aliens were forbidden to land at or depart from such ports without the permission of a secretary of state.

The secretary of state was authorized to deport any alien (whether an enemy subject or the subject of a friendly power) whenever in his judgment it was deemed advisable. Enemy aliens were prohibited without a permit from entering or residing temporarily in certain designated areas, several hundred in number, some of which embraced whole counties and many boroughs, parishes, and districts, especially on the sea-coast.<sup>1</sup> Enemy aliens residing anywhere in the United Kingdom and all aliens, whether friends or enemies, residing in prohibited areas, were required to register with a local registration official, and in case of a contemplated change of residence they were required to furnish the registration officer full particulars in regard to the date of the intended change and of the place to which it was proposed to remove. No enemy alien was allowed to travel more than five miles from his registered place of residence without a permit, which was limited to twenty-four hours, except in special circumstances. No enemy alien, without the written permission of the registration officer, was allowed to have in his possession any fire-arms, ammunition, petroleum, signalling apparatus, motor cars, cycles, or boats, air craft, cipher code, telephone installation, military or naval charts, and various other articles. Likewise the circulation among enemy aliens of any newspapers printed wholly or mainly in the language of an enemy State was forbidden except with the written permission of a secretary of state. The secretary of state for home affairs was empowered to order any chief officer of police to close any premises used for the purposes of a club and habitually frequented by enemy aliens.

By an order in council of January 7, 1915, registration officers were authorized to grant to Turkish subjects belonging to the Greek, Armenian, or Syrian races or members of any other community well known to be opposed to the Turkish régime, certificates of exemption from any or all of the provisions of

<sup>1</sup> Permits to reside in the prohibited areas appear to have been granted rather freely. In December, 1916, 4294 enemy aliens were reported as residing in these areas. *Solicitors' Journal and Weekly Reporter*, December 30, 1916, p. 162.

the aliens restrictions order, except those which applied to alien friends.<sup>1</sup>

§ 45. **Proposed Exchange of Enemy Aliens.** At the outbreak of the war the British government accorded to German subjects a period of seven days during which they might leave, but it does not appear that any considerable number actually got away. Neither Germany nor Austria-Hungary, however, allowed any period of grace, and all male British subjects, regardless of their age or condition, were refused permission to return to their native country.<sup>2</sup> Soon after the outbreak of the war the German government informed the British government through the American ambassador at Berlin that it was prepared to allow British subjects then in Germany to leave, provided the British government would accord reciprocal treatment to German subjects in Great Britain. In short, the German government proposed that the British government should exchange more than fifty thousand Germans resident in England for some five thousand British subjects in Germany. The German population in England was classified as (a) reservists, who were under duty to render military or naval service; (b) persons detained for military or naval reasons, and (c) non-combatants "not specially detained." Many reports having reached England that British subjects detained in Germany were being badly treated, the British government gave serious consideration to the German proposal and on August 31 replied expressing its willingness to permit all German women and children,<sup>3</sup> all males under sixteen and over forty-four years of age and all persons between those ages, who were not under liability for military service in Germany and who would give an undertaking not to take part, directly or indirectly, in the operations of the war, to leave provided the German government would reciprocate. The British government, however, was not prepared to exchange men who upon their return to Germany would be conscripted into the military or naval service, nor those who were being held in

<sup>1</sup> Measures similar to those adopted in England were taken in the British over-seas dominions, although they were less rigorous and elaborate.

<sup>2</sup> Satow, article cited, p. 8.

<sup>3</sup> The British government stated that in fact it had from the first allowed women and children to leave England, although the German government had not accorded reciprocity of treatment in respect to women of British nationality.

England for crimes against the common law or upon charges of espionage, nor those who, while not liable to military service, would not give the undertaking referred to. On September 15 the German government replied to the British counter-proposal, offering to accept it in the main, except that it refused to allow the departure of British males of military age who were not under duty of military service in England, even though they were willing to give an undertaking not to take part in the operations of the war. It having in the meantime come to the attention of the British government that the liability to military service in Germany had been extended to include males up to the fifty-fifth year, it withdrew its offer and caused the German government to be informed that it could not grant the privilege of departure to males between the ages of sixteen and fifty-five years.<sup>1</sup> The offer to repatriate women and children and males over fifty-five years of age, however, remained unaffected.<sup>2</sup>

An arrangement was early reached providing for the exchange of invalids and other persons who were incapable of performing military service, but the German government hesitated, if it did not refuse, to release retired military and naval officers who were at German health resorts at the outbreak of the war. After a protracted correspondence an agreement was also reached for the reciprocal exchange of such diplomatic and consular representatives as had been detained in the two countries.

<sup>1</sup> The German government denied that compulsory military service existed for men over forty-four years of age, although it admitted that such persons were serving in the army as volunteers. The British government took the position, however, that the fact that men up to fifty-five years of age were actually serving in the German army must be taken into consideration in reaching an agreement.

<sup>2</sup> Correspondence between His Majesty's Government and the United States Ambassador Respecting the Release of Interned Civilians, etc. *Misc.*, No. 8 (1915), Cd. 7857. An arrangement was early concluded between the British and Austro-Hungarian governments by which male subjects under the ages of seventeen and over fifty, together with physicians, clergymen, invalids without regard to age, and of course women and children, were reciprocally released. *Misc.*, No. 35 (1916), Cd. 835, No. 2. The controversy in regard to the age limit of persons capable of military service, which prevented for many months an agreement between the British and German governments, did not arise between England and Austria-Hungary. It appears that in other respects the policy of the British government concerning the treatment of Austro-Hungarian nationals in England was marked by exceptional leniency owing to the liberal treatment by the Austro-Hungarian government of British subjects in that country. Cf. Williams, "Treatment of Alien Enemies," *Quarterly Review*, October, 1915, p. 425; also Phillipson, *Internat. Law and the Great War*, p. 88.



In reply to an inquiry from Berlin of November 3, 1914, received through the American embassy, as to whether the British government was arresting "wholesale" German subjects over forty-five years of age, Sir Edward Grey stated that no Germans over that age had been arrested. At the same time he asked the American ambassador to call the attention of the German government to the fact that His Majesty's government was faced with a problem which did not exist in Germany. There were, he said, upwards of fifty thousand Germans residing in England, the presence of whom must necessarily be a cause of anxiety to the military authorities who were charged with taking suitable measures for the defence of the realm. The German government, on the other hand, had not the same excuse for proceeding to a wholesale arrest of British subjects in Germany, since, owing to the small number of them, the scattered condition in which they lived, and the different character of the classes to which they belonged, they could not under any circumstances be regarded as constituting the same danger to Germany that the masses of German subjects in Great Britain constituted to this country.<sup>1</sup>

Sir Edward Grey on November 12 denied that there had been any general arrest of Germans over forty-five years of age; only individual suspects had been subjected to such treatment. Steps, he said, were being taken to release and send back to Germany all persons detained who were over fifty-five years of age except a few suspects.<sup>2</sup>

**§ 46. Final Agreement Reached.** The correspondence between the two governments regarding the matter continued throughout the years 1915 and 1916.<sup>3</sup> The German government desired, first of all, a general release by each belligerent of all civilians without exception held by the other. The British government took the position that it could not afford to exchange the entire German population resident in Great Britain for the British population in Germany, owing to the very great disproportion in their numbers.

Finally, all hope of reaching an agreement on the basis of

<sup>1</sup> Phillipson, *Internat. Law and the Great War*, p. 16.

<sup>2</sup> *Ibid.*, p. 24.

<sup>3</sup> The additional correspondence is found in two British Parl. Papers, *Misc.*, No. 35 (1916) and No. 1 (1917), issued in continuation of the parliamentary papers already cited.

the British proposal having passed, the British government "from motives of humanity" yielded and agreed to release virtually all German male civilians over forty-five years of age provided Germany would release all British male civilians then held as prisoners. The German government expressed regret that the British government could not see its way clear to accept its proposal for the reciprocal release of all civilian prisoners, but nevertheless it agreed to accept the proposal for the release of all males over forty-five years of age as the only means of preventing the failure of the agreement. This agreement was definitely concluded in January, 1917. Germany obtained under this agreement the release of about seven thousand of her subjects held as interned civilian prisoners in England and the dominions, whereas Great Britain on her part secured the repatriation of only some six or seven hundred British subjects held in Germany. In agreeing to a proposal which operated so unequally as between the two parties the British government took occasion to point out "the magnitude of the concession which in the interests of humanity" it had made, under which German and British subjects had become eligible for repatriation in the approximate proportion of nine to one.

§ 47. **Early British Policy as to Internment.** The policy of the British government in the beginning was to interfere as little as the public safety permitted with the liberty of enemy aliens. Only suspects, those likely to prove dangerous in case they were left at large, and persons likely to become a public charge were arrested and interned. Naturally, in consequence of the excitement and general confusion many persons were hastily arrested and sent off to concentration camps on unfounded suspicion, only to be subsequently released.<sup>1</sup> According to a statement made in the House of Commons by the prime minister in May, 1915, about nineteen thousand Germans and Austro-Hungarians were then interned in various camps, leaving some forty thousand still at liberty.

§ 48. **Mob Outbreaks.** There was no thought at first of interning the entire enemy alien population, but in consequence of various acts of the Germans — such as the bombardment of West Hartlepool, Scarborough, and Whitby; the dropping of

<sup>1</sup> Cf. the London weekly *Times* of July 4, 9, and 11, 1915.



Zeppelin bombs on undefended towns; the use of asphyxiating gases; the reports of ill treatment of British prisoners, and the like — public opinion in England became greatly excited, and it was turned to wrath by the sinking of the *Lusitania* in May, 1915. The growing indignation against the Germans manifested itself in various forms, such as the exclusion of persons of German origin from the commercial exchanges,<sup>1</sup> the boycotting of German shops, maltreatment of unoffending individuals, and the like. The sinking of the *Lusitania* caused a wave of indignation to sweep over England which was speedily followed by mob outbreaks in various parts of the United Kingdom and in the over-seas dominions, as a result of which many German houses and shops were wrecked or looted. In the east end of London, especially, the damage done by the rioters was very great. In Liverpool the value of property destroyed was estimated at two million dollars. In various other places the losses reported were large. In the town of West Ham the riots lasted for several days, and the damage done was estimated at a half million dollars. Mr. McKenna stated in the House of Commons that 257 persons, of whom 107 were police or special constables, were injured in the riots at London. In some communities the rioters made no distinction between unnaturalized Germans and British subjects of German origin,<sup>2</sup> but proceeded on the assumption that once a German, always a German. Occasionally also native-born British subjects were made the object of attack through mistake, and instances were reported of the destruction of houses belonging to persons of English, Swiss, and Russian nationality who bore Teutonic names.

As already stated, attacks upon the Germans were not confined to the United Kingdom, but spread to the British possessions beyond the seas. In Victoria, British Columbia, the sinking of the *Lusitania* was followed by an outbreak against German establishments, and the city had to be put under martial law. At Johannesburg a series of violent anti-German demonstrations took place, which culminated in the wrecking wholly or in part of some fifty German and Austrian houses and the destruction of their contents. The total damage done was

<sup>1</sup> London daily *Times*, May 11, 1915, p. 10.

<sup>2</sup> *Ibid.*, May 13, 1915, p. 9.

estimated to have exceeded one million dollars. At Cape Town, Port Elizabeth, Pretoria, Maritzburg, Kimberley, Bloemfontein, and other places serious disorders took place and considerable damage was done.<sup>1</sup> The occurrence of these outbreaks was deeply deplored by the great majority of the English people, although in view of the strong provocation occasioned by the barbarities of the German army and navy, they were regarded as the natural manifestations of an outraged public opinion.<sup>2</sup>

§ 49. **Demand for General Internment.** In consequence of the intense anti-German feeling throughout the empire a widespread popular demand was made for the internment of the entire German population, partly in their own interest, since it was impossible to protect them against mob violence as long as they remained scattered or isolated among the English population, and partly in the interest of the national defence, since they constituted a danger to the realm as long as they were left at large. Popular meetings were held in various places at which addresses were made and resolutions adopted calling on the government to adopt vigorous measures. Popular hostility, as has been said, was not confined by any means to persons of enemy nationality, but it was directed as well against Germans who had lived in England many years, who had become British subjects, and upon whom honors and titles had been conferred by the crown. Men like Sir Edgar Speyer and Sir Edward Cassel were the objects of violent attacks because of their German birth, although before the outbreak of the war no persons were more highly respected. In consequence of the attack upon his loyalty Sir Edgar Speyer resigned his privy councillorship and requested the prime minister to revoke his baronetcy. The king, however, refused to accept his resignation, and the prime minister characterized the attack as "baseless and malignant." There being no way by which a privy councillor could divest himself of his title, the anti-German League brought *quo warranto* proceedings against both men to compel them to show by what authority they claimed to be members of the privy council. The question was argued

<sup>1</sup> Some estimates of the value of property destroyed in South Africa placed the amount as high as five million dollars.

<sup>2</sup> Cf. the remarks of Mr. Bonar Law in the House of Commons on May 13, 1915.

at great length by an array of distinguished counsel, the attorney general going so far as to contend that the king was practically above the law in making appointments of this kind, since they were purely personal to the sovereign, and that it was not competent for the court to inquire into the status of privy councillors. The court, however, refused to admit the soundness of this contention; nevertheless it held that the section of the Act of Parliament referred to above had been repealed by the Naturalization Acts of 1870 and 1914, and consequently the disqualification no longer existed. Naturalized British subjects of alien birth were therefore qualified to be members of the Privy Council.<sup>1</sup>

**§ 50. Policy of General Internment Adopted.** But the popular demand for wholesale internment of the enemy population was so great that the government was compelled to yield, and on May 13, 1915, the prime minister announced that the government had decided upon a measure of general internment.

"At this moment," he said, "some 40,000 unnaturalized aliens, of whom 24,000 are men, are at large in this country. The government proposes that all adult males of this country be segregated and interned. If over the military age, they should be repatriated. The government recognizes that there may be cases calling for exceptional treatment. Women and children in suitable cases should be repatriated, but there no doubt will be many cases in which justice and humanity will require that they be allowed to remain."

"An official body, judicial in character, will be set up to deal with claims for exemption, and as soon as the military and naval authorities have provided the necessary accommodations, those who have not secured exemption will be interned. In the case of naturalized aliens, who in law are British subjects, numbering about 8,000, the *prima facie* presumption should be the other way, but exceptional cases established to the satisfaction of the advising body will be specially dealt with. There must be powers of internment in cases of proved necessity or danger."

In accordance with this announcement an order in council was issued in June empowering the home secretary to intern *any person*, when in view of his "hostile origin or association it seemed expedient to do so for the public safety." Under this order British subjects of hostile origin or association could

<sup>1</sup> Cf. the *Law Times* of January 8, 1916 (Vol. 140) pp. 201-202; the London weekly *Times* of December 24, 1915, and the London *Solicitors' Journal and Weekly Reporter*, July 3, 1915, p. 595. Text of the decision in *Law Times*, September 16, 1916, pp. 89 ff.

## POLICY OF GENERAL INTERNMENT ADOPTED 73

be arrested and interned in detention camps without due process of law and without the benefit of the writ of *habeas corpus*, and many were in fact so arrested and imprisoned. There was some protest against the validity of the order,<sup>1</sup> but it was sustained by a decision of the court of appeal in *Zadig's case*.<sup>2</sup>

In accordance with the announcement of the prime minister on May 13, practically the entire enemy population, as well as the majority of naturalized British subjects of enemy origin and including also several thousand friendly aliens, was arrested and sent to concentration camps in various parts of England and in the Isle of Man. It was stated in the House of Commons on December 14, 1915, that the number of aliens then interned amounted to 45,749. Of these, 32,274 were civilians, and 13,475 were described as "naval and military men."<sup>3</sup> Complaint was made in Parliament as late as February, 1917, however, that 4,294 enemy aliens, including 287 men of military age, were still uninterned and that Germans were still carrying on business in London.<sup>4</sup> Exemptions were granted in exceptional cases, a special internment committee having been appointed to pass upon applications from persons who for one reason or another claimed that they were entitled to be left at liberty.<sup>5</sup>

<sup>1</sup> Cf. the criticism in the *London Solicitors' Journal and Weekly Reporter*, Vol. 60, p. 233, and the London weekly *Times* of July 18, 1916. The order was attacked in the House of Commons by Mr. Ashley, who declared that "we have substituted for the tyranny of a king, the tyranny of a home secretary." The order was defended by Sir Herbert Samuel, the home secretary, who said it would be dangerous in war times to set up a technical distinction between enemy aliens and British subjects hostile in their origin or association.

<sup>2</sup> A.C. 260 (1917). Lord Dunfermline dissented in a long opinion. The *London Times* severely criticised this decision. Nevertheless the *Times* admitted that the public "were in no mood just now to quarrel with thoroughness in the defence of the realm even though it should mean an occasional act of hardship or injustice to individuals." The decision is also criticised by the *Law Quarterly Review* of July, 1917, p. 205.

<sup>3</sup> Sir Herbert Samuel stated in the House of Commons in July, 1916, that at the outbreak of the war there were about 75,000 Germans and Austro-Hungarians living in England. At the time of his statement all but 22,000, he said, had either been interned or repatriated. Of these, 10,000 were women, 4000 friendly aliens, and 1500 were aged people, leaving 6500 to whom exemptions had been granted. *London weekly Times*, July 7, 1916.

<sup>4</sup> *London weekly Times*, February 23, 1917.

<sup>5</sup> Sir John Simon in July, 1915, stated that the applications of more than six thousand such persons had been granted and that most of them had been repatriated. *Solicitors' Journal and Weekly Reporter*, July 31, 1915, p. 672.

So far as possible, work was provided at the camps for those desiring it; tools, materials, and instructors in the handicrafts were furnished, educational classes were organized, libraries established, and the like. According to the reports of representatives of the American embassy who inspected the camps from time to time, the civilian prisoners were well treated and were probably better off than they would have been had they been left scattered over the country, where they would have been exposed to ill treatment.<sup>1</sup>

#### FRENCH POLICY

§ 51. **Early Measures Adopted in France.** The problem which confronted the government of France at the outbreak of the war was by reason of the large number of enemy aliens in the national territory and the geographical proximity of the country to Germany, even more serious than that which faced the British government. In addition to the large number of permanent residents of enemy nationality who had lived in the country for many years and were engaged in business or the practice of professions there were thousands of German and Austrian tourists who were caught there by the suddenness of the outbreak of the war.<sup>2</sup>

On August 2, 1914, when the outbreak of war with Germany was imminent, the French government gave notice that all foreigners might leave France before the end of the first day of mobilization. On the same day a decree was issued commanding all persons of foreign nationality, without distinction as to age, or sex, to make known their identity to the *commissariat* of police at the *mairie* or to an administrator at their place of residence. The same decree required all German and Austro-Hungarian subjects to evacuate the region of the Northwest as well as a part of the Southwest, including also the fortified districts embracing Paris and Lyons, and to retire to certain places in the west where work, if possible, would be provided for them. Eventually they would either be allowed to leave the country or authorized to continue their residence.

<sup>1</sup> I have dealt with the question of the treatment of interned civilians in detention camps in the chapters on treatment of prisoners, (Chs. XXI-XXII).

<sup>2</sup> Their unhappy lot and the services rendered them by the American embassy during the early days of the war are described by Eric Fisher Wood in his *The Note Book of an Attaché*, pp. 2-8.

In the latter event they would be furnished with a *permis de séjour*, but would not be allowed to change their places of residence without a safe-conduct establishing their identity.

Natives of Alsace-Lorraine, not naturalized as French citizens but who were members of families long established in the country and whose origin and sentiments were known, as well as families of which at least one member had enlisted in the foreign legion were allowed to remain with full liberty of action.<sup>1</sup> By a decree of the same date the territory of Belfort was declared to be in a state of siege. The measure requiring the evacuation of the regions mentioned was deemed necessary on account of the rapid advance of the German armies and the certainty that those regions would soon become the theatre of actual warfare.

Until August 3 Germans and Austro-Hungarians were free to leave France without restriction, and in spite of the briefness of the period allowed and the difficulties of transportation due to the use of the railways by the French government for the mobilization of its armies a considerable number succeeded in getting away. The greater number, however, either preferred to remain or were compelled to do so on account of the difficulties mentioned. All who remained were from the beginning subjected to a rigorous régime of surveillance for the purpose of preventing espionage and other acts calculated to compromise the national security.<sup>2</sup>

§ 52. **General Internment in France.** In consequence of the more serious character of the enemy alien problem in France as compared with that of England the French government considered that the public safety did not permit enemy aliens to be left at large, as was done in England for some eight months after the beginning of the war. In the early days of the war, therefore, the greater part of the enemy alien population, particularly that of Paris, was removed to concentration camps located in various parts of France, mostly in the western departments behind a line extending from Dunkirk to Nice.<sup>3</sup>

<sup>1</sup> Text of the decree in Dalloz, *Guerre de 1914*, Vol. I, p. 19; *Législation de la Guerre*, Vol. I, pp. 13-14; 42 *Clunet*, 95-96; and 22 *Rev. Gén. de Droit Int. Pub.*, Docs. 7-8.

<sup>2</sup> Valéry in 23 *Rev. Gén. de Droit Int. Pub.*, 359.

<sup>3</sup> The minister of the interior stated in December, 1915 (*Journal des Débats*, December 12), that the number of German and Austro-Hungarian subjects then interned in concentration camps was about 45,000. He also stated that the number of aliens who had been "chased" from France since the outbreak of



The persons so interned were divided into two groups: (1) natives of Alsace-Lorraine, Czechs, Greeks, Poles, and Armenians; (2) Germans, Austro-Hungarians, Ottomans, and Bulgarians. As in England, enemy aliens belonging to the first group were regarded as being the unwilling subjects of their respective governments, and their sympathies were assumed to be largely on the side of the Entente allies. In consequence they were separated from other interned enemy aliens and allowed a relatively larger degree of freedom, such as the privilege of spending the daytime away from the camps to which they were attached.<sup>1</sup> Those in the second category, however, were allowed no such privileges and were kept under a régime of strict surveillance.<sup>2</sup>

§ 53. **Agreement as to Exchange.** Owing to the fact that the disproportion between the enemy alien population of Germany and France was less than that between England and Germany and also because males of military age of both France and Germany were liable to compulsory military service, the difficulties of reaching an agreement in respect to the exchange of certain classes were less serious. As early as October, 1914, therefore, an agreement was reached for the reciprocal repatriation of all males, except those between the ages of sixteen and sixty, and of all women regardless of age. Subsequently a new agreement was entered into for the repatriation of all males under seventeen and over fifty-five and also of males between those ages who were incapacitated for military service by reason of their affliction with any one of twenty specified diseases or infirmities.<sup>3</sup>

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the war was 4700; the number of arrests on the charge of espionage was 1125; the number of persons condemned to death by the councils of war was 55; the number condemned to forced labor was 34; to *réclusion* 14; to imprisonment 29. Aside from the condemnations by the councils of war there was a considerable number of condemnations by the judicial courts.

<sup>1</sup> Enemy aliens of this class were accorded specially favorable treatment in other respects. Thus they were allowed the benefit of the *moratorium* and were granted *permis de séjour* more freely than were other enemy aliens. Moreover, the measures in respect to sequestration were enforced against them with less rigor. In these respects also Bulgarians and Ottomans "not actively hostile" appear to have been treated with more liberality than were Germans and Austro-Hungarians. See Clunet, 1915, p. 1091, and 1916, pp. 267 and 1634.

<sup>2</sup> Valéry, p. 362.

<sup>3</sup> It was announced in the press despatches from Berlin on November 24, 1916, that some twenty thousand German civilians then interned in France would in accordance with this agreement be released and allowed to return to Germany. The number of Frenchmen in Germany who were repatriated in pursuance of the arrangement was, however, considerably smaller.

A similar agreement was entered into between the French and Austro-Hungarian governments.<sup>1</sup>

§ 54. **Attitude of Public Opinion in France.** In France as in the other belligerent countries popular hostility towards enemy aliens manifested itself in a variety of forms. Generally in all of them persons of enemy nationality were deprived of all titles, honors, or dignities which had been conferred upon them by the governments with which their countries were at war; and even scientists were expelled from academies and learned societies. By a French decree of November 17, 1914, all German subjects (except residents of Alsace-Lorraine who were of French origin) who had received appointments in the Legion of Honor were dismissed as an act of reprisal against the Germans for various acts of barbarity and especially for their destruction of historic monuments.<sup>2</sup> As an answer to the manifesto of the ninety-three German intellectuals most of the French academies and learned societies expelled members who were the subjects of enemy powers.

§ 55. **Denationalization of French Citizens of Enemy Origin.** As in England, hostility to Germans and Austro-Hungarians was not confined to those who were subjects of enemy powers, but it was extended to persons of enemy origin who had been naturalized in France. Although the policy of denationalization was not resorted to in England (there was, however, considerable popular demand for it), in fact naturalized British subjects of enemy origin were interned, as has been stated, and otherwise subjected to the same restrictions and disabilities as those imposed upon enemy subjects. France went further and by an Act of Parliament of April 7, 1915, provided for the denationalization of naturalized French citizens born in enemy countries.<sup>3</sup> The measure was made compulsory in the case of those who had borne arms against France, or who had left French territory to escape military service, or who had directly or indirectly given aid to the enemy. All naturalization certificates granted to the subjects of enemy countries since January 1, 1913, were to be revoked. The minister of justice was

<sup>1</sup> Text in 43 *Clunet*, 515.

<sup>2</sup> Text in *Législation de la Guerre*, Vol. I, p. 206, and 22 *Rev. Gén.*, Docs., 38.

<sup>3</sup> Inhabitants of Alsace-Lorraine who were French citizens prior to 1871 or descendants of such persons were excepted.



required to make known within three months the names of all naturalized Frenchmen who in his judgment were deemed worthy of retaining their French nationality. The certificates of all others were to be withdrawn and the denationalization to be considered as having taken effect from the date of the outbreak of the war, without prejudice to the rights of third parties.<sup>1</sup>

#### GERMAN AND AUSTRO-HUNGARIAN POLICY

§ 56. **Early German Policy.** Aside from the refusal of the German government to allow any days of grace during which enemy aliens might leave, such as were allowed in England and France, the general policy of the German government was less drastic in the beginning than that of either the British or French governments, for there the problem was less serious, owing to the relatively small number of enemy aliens and the absence of any such extensive system of espionage as existed in England and France. Strong complaints, however, were made in England of the harsh treatment to which British subjects, especially invalids at Nauheim, Carlsbad, and other places, were subjected and of the imprisonment of others.<sup>2</sup> Both British and French nationals are said to have been summarily expelled from various cities, without distinction as to age or sex and without being allowed to take their baggage with them. For a time, however, no general legislative or administrative measures affecting enemy aliens were adopted.

<sup>1</sup> *Législation de la Guerre*, Vol. II, p. 101; Dalloz, *op. cit.*, Vol. IV, p. 114; and 42 Clunet, 129 ff. and 345 ff.

<sup>2</sup> Satow, *Treatment of Enemy Aliens*, Pubs. of the Grotius Society, Vol. II, p. 8. Serious charges were also made by the French government against the German authorities of the rough and brutal treatment to which its consuls at Mannheim, Düsseldorf, Stuttgart, and other places were subjected. Cf. the reports made by these consuls to their government, 22 *Rev. Gén. de Droit Int. Pub.* (1915), Docs., pp. 62-64 and 72-73.

The Russian government also complained of various brutalities to which its nationals in Germany were subjected. Cf. text of a circular communicated to the press by the Russian embassy at Paris on January 13, 1915, 22 *Rev. Gén. de Droit Int. Pub.* (1915), Docs., pp. 105-109. Ambassador Gerard says all Japanese in Germany were immediately imprisoned upon the outbreak of war between the two countries. Popular hostility toward Japanese residents, he says, was very strong. No restaurant in Berlin would admit them, and they had to be supplied with food by the American embassy. When Mr. Gerard finally obtained permission for them to leave Germany, he had to send an escort with them to the Swiss frontier to protect them against attack. *My Four Years in Germany*, p. 156.

They were allowed access to the courts (unless domiciled abroad); their property and business enterprises were not put under sequestration, and there was no wholesale internment of the enemy alien population in concentration camps. Very soon, however, in consequence of reports reaching Germany that large numbers of Germans were being arrested and imprisoned in England and that the entire German population had been compelled to evacuate certain regions of France, the German government proceeded to adopt retaliatory measures.<sup>1</sup>

§ 57. **General Internment in Germany.** Accordingly on November 6, 1914, an order was issued by the German government for the general internment of all British males between the ages of seventeen and fifty-five. This order, it was added, "was occasioned by the pressure of public opinion which had been still further excited by the newspaper reports of a considerable number of deaths in the concentration camps."<sup>2</sup> As in England and France, civilian prisoners were segregated and confined in specially improvised concentration camps, most of the British being housed in the buildings of a race course at Ruheleben near Berlin. There were, of course, many complaints of harsh treatment of prisoners in the German concentration camps, and some of them were undoubtedly well founded.<sup>3</sup> In pursuance of the exchange agreement referred to above a large number of French civilian prisoners were repatriated.

The Russian government also complained of the harsh and brutal treatment which Russian men, women, and children are alleged to have received at the hands of the German authorities. They were, it was charged, rounded up, carried away in dirty cattle trucks, confined in stables and pig sties, compelled to march with their hands tied behind them, and otherwise

<sup>1</sup> *British Parl. Papers, Misc.*, No. 8 (1915), Cd. 7857, p. 19.

<sup>2</sup> The few Americans who remained in Germany were not interned. According to an official announcement from Berlin on April 14, 1917, they were to be treated along the same lines as laid down in President Wilson's proclamation concerning the treatment of Germans in the United States. They appear to have been allowed substantially the same freedom of movement as was allowed neutral persons, except as to residence in fortified places. According to a press despatch of April 24, 1917, however, American newspaper correspondents were notified that their presence was no longer "desirable," and they accordingly transferred their residences to neutral countries.

<sup>3</sup> The treatment of interned civilians is considered more at length in the chapters on treatment of prisoners, (Chs. XXI-XXII).

maltreated. All Russian males between the ages of eighteen and fifty were arrested as prisoners of war and were forbidden to take their effects with them to the prison camps.<sup>1</sup>

Serious charges were made by the Austro-Hungarian government against the Russian government for its alleged harsh treatment of Austrian and Hungarian nationals found in Russian territory at the outbreak of the war.<sup>2</sup> Similar charges were also made against Servia.

§ 58. **Status of Germans in Italy.** Legally Germans in Italy and Italians in Germany were in a situation different from that of enemy aliens in any other country at the outbreak of war. This was due to the fact that on May 21, 1915, three days before Italy declared war against Germany, the two governments, in the full expectation of an early outbreak of hostilities, concluded a special agreement concerning the treatment which each would accord the subjects of the other who might be found in its territories in the event of war.<sup>3</sup> The treaty provided for a mutual guarantee in respect to the persons and property of the subjects of each party. They were to be allowed to continue their residence without molestation, except that they might be ordered to reside in designated localities and be subjected to police measures in case the public safety and order should so require. The right of departure from the country was allowed; they were to be subject to no restrictions different from those imposed on neutral persons sojourning in the country; there was to be no sequestration of property, no confiscation of patent or other rights of this character, no abrogation or suspension of contracts or debts; the rules of Hague convention No. VI in regard to the status of merchant vessels in port at the outbreak of the war were to be applied by each party, and the like. No such treaty having been

<sup>1</sup> These and other charges are contained in a report issued by the Russian government, the text of which may be found in 22 *Rev. Gén. de Droit Int. Pub.* (1915), Docs., pp. 105-109. In December, 1917, an arrangement was entered into between the German and Russian governments, through the medium of the American minister at Stockholm and the American ambassador at Petrograd, for the reciprocal repatriation of all women, children, and men over forty-five years of age held as civilian prisoners in both countries. It was stated that the agreement embraced about a hundred thousand Germans in Russia, although the number of Russians in Germany affected was inconsiderable.

<sup>2</sup> Cf. the Austro-Hungarian red book, *Collection of Evidence*, etc., pp. 43-45.

<sup>3</sup> Text in 43 *Clunet*, 407-408.

entered into between Italy and Austria-Hungary, a somewhat anomalous situation was thus created. The Italian government had adopted stringent measures in its treatment of Austro-Hungarian subjects, but in virtue of the above-mentioned agreement it could not apply the same measures to German subjects.<sup>1</sup> The favored treatment thus enjoyed by Germans as compared with that to which Austrians and Hungarians were subjected was the subject of considerable criticism in Italy, and the bar of Milan adopted a resolution expressing the opinion that no distinction should be made between Germans and Austro-Hungarians in respect to their treatment. This view was strengthened by the alleged violation by the German government of the Italo-Germanic agreement. It was alleged that while the Italian courts were open to Germans, the German decree of August 7, 1914, closing the German courts to enemy aliens domiciled outside Germany, applied to *all* enemy aliens, no exception being made in the case of Italians, as the spirit of the treaty required. Moreover, it was alleged that bankers of Berlin refused to make payments to Italian creditors, and by a decree of July, 1916, governor-general von Bissing of Belgium subjected Italians in that country to a régime of surveillance. Finally, the German government refused to pay pensions due to Italian laborers under the German workingmen's pension laws, notwithstanding the stipulations in the treaty of May 21 that contracts would not be impaired or abrogated.<sup>2</sup>

In short, Germany had treated the agreement of May 21 as a "scrap of paper." Notwithstanding the popular opposition to the special régime which the treaty established in behalf of the Germans in Italy and the alleged refusal of the German government to abide by its stipulations, it does not appear that the Italian government yielded to the popular demand by placing Germans and Austro-Hungarians on the same footing.<sup>3</sup>

<sup>1</sup> Valéry, *Condition des Allemands en Italie postérieurement à la Déclaration de Guerre à l'Autriche*, 43 Clunet, 405-415.

<sup>2</sup> Valéry, *La Condition Juridique des Allemands en Italie depuis la Déclaration de Guerre à l'Autriche jusqu'à la Déclaration de Guerre à l'Allemagne et postérieurement à celle-ci*, 44 Clunet, 69 ff. See also Pellizzi, *Condition des Sujets Ennemis en Italie*, 45 Clunet, 539 ff. and 1082 ff.

<sup>3</sup> In consequence of the alleged refusal of the German government to allow Italians access to the German courts the bar of Milan addressed a circular to

§ 59. **The Portuguese Measure of Expulsion.** Portugal appears to have been the only country which resorted to the policy of wholesale expulsion. By a decree of April 20, 1916, all German subjects of both sexes, except males between the ages of sixteen and forty-five years, were ordered to leave the country within fifteen days. The latter were interned in a concentration camp on the island of Terceira. Persons born in Portugal of German fathers were also treated as enemy subjects. Violation of the decree of expulsion was punishable by three years imprisonment in a fortress in case of men, and two years correctional imprisonment in case of women.<sup>1</sup>

§ 60. **Japanese Policy.** Japanese treatment of enemy aliens is said to have been exceptionally liberal. Although all Japanese subjects in Germany were arrested at the outbreak of war between the two countries and were treated with great indignity, the Japanese government did not resort to such a measure, but treated Germans as it did foreigners of neutral nationality. There were no outbreaks against Germans and no manifestations of hostility. Not even German teachers or tutors were discharged. No restrictions were placed upon their freedom of movement, and even German reservists were allowed to return to Germany on Japanese ships. German business men continued their business as before the war, without molestation or restriction, and agents of German houses regularly furnished their Japanese customers with goods.<sup>2</sup>

§ 61. **Policy of the United States.** Notwithstanding the large number of Germans in the United States the enemy alien problem there was far less serious than in the European countries, owing to the remoteness of the country from the theatre of hostilities. Nevertheless, owing to the existence of an extensive system of espionage which had been organized in the United States since the outbreak of the war in Europe, and the presence of a large number of emissaries, plotters, and the like,

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the bar of the rest of Italy expressing the opinion that it was the duty of all Italian lawyers to refrain from taking cases in which Germans were plaintiffs. Text of the circular in 43 Clunet, 413 ff.

<sup>1</sup> Text of the decree in 43 Clunet, 1424 ff.

<sup>2</sup> 43 Clunet, 1712 ff.

English and French subjects in Japan are said to have protested against the exceptional liberality with which the Germans were treated, but the Japanese government does not appear to have modified its policy.

who even before the outbreak of the war between the United States and Germany were engaged in organizing plots for blowing up ammunition plants and for committing other acts of sabotage, it was impossible for the government to remain indifferent to the presence of such a danger. Already before the declaration of war, German merchant vessels lying in American ports had been seriously damaged by the removal or destruction of their machinery by their crews upon the orders of the German government, and it was assumed that if left at liberty after the outbreak of war their presence would constitute a grave danger. They were therefore arrested and confined in concentration camps in various parts of the country.

On April 16, in pursuance of section 4067 of the revised statutes, the President issued a proclamation enjoining all enemy aliens to preserve the peace and to refrain from committing crimes against the public safety, acts of hostility, or from giving information, aid, or comfort to the enemies of the United States.<sup>1</sup> The proclamation declared that as long as they should demean themselves in accordance with the law, they would be "undisturbed in the peaceful pursuit of their lives and be accorded the consideration due to all peaceful and law-abiding persons, except so far as restrictions might be necessary for their own protection and for the safety of the United States." The proclamation then proceeded to lay down certain regulations which were to govern the conduct of enemy aliens. These regulations prohibited any enemy alien from having in his possession fire-arms, ammunition, cipher code, signalling apparatus, or other warlike materials or in-

<sup>1</sup> The status of enemy aliens in the two countries was regulated to some extent by the Prussian-American treaty of 1799. After the American ambassador had been recalled from Berlin but before his departure, the German foreign office brought strong pressure to bear upon him to induce him to sign a protocol agreeing to certain "explanations and additions" to article 23, but he refused since he no longer had authority to negotiate. After his departure the German foreign office renewed its efforts through the Swiss legation at Washington but without success. The purpose of the German proposal was to enlarge the rights of enemy aliens as defined by the treaty of 1799, so as to include the right to remain after the expiration of the nine months stipulated for, with freedom to leave at any time during that period; immunity from detention in concentration camps; non-sequestration of property except under laws applying to neutrals; protection of patent rights and other contracts, and the application of Hague convention No. VI to the treatment of enemy merchant vessels in port at the outbreak of war. Gerard, *My Four Years in Germany*, pp. 379 ff.



struments; from approaching or residing within one-half mile of any fort, camp, arsenal, air craft station, vessel, navy yard, or place where ammunition or war materials were manufactured; from writing, printing, or publishing any attack upon the government of the United States or any measure or policy thereof, or against any person in the military or civil service of the United States or any local government, and the like.

The proclamation further prohibited enemy aliens from residing in or entering without a permit any locality which the President might designate as a prohibited area, and from departing from or entering the United States without a permit under such conditions as the President might prescribe.

Any enemy alien whom the President might have reasonable cause to believe was aiding or about to aid the enemy or whose presence at large was believed to be a danger to the public safety, might be removed to any place designated by him or might be required to leave the United States. Any such person might also be summarily arrested and confined in prison or in a detention camp. From time to time regulations were issued designating prohibited areas in which enemy aliens were forbidden to reside or enter.<sup>1</sup> By a regulation issued in November, 1917, all enemy aliens were required to register.

The proclamation of April 16, it will be noted, did not allow any period of grace during which enemy aliens might leave the United States; but the proclamation was not issued until nearly two weeks after the declaration of war; a considerable period in fact was allowed them to leave, and some did go to Mexico. After the issuance of the proclamation they could leave only with a permit. In consequence of the Anglo-French blockade it would have been impossible for any Germans to return to their own country, had the right of departure been allowed by the American government. Aside from the few Germans connected with the German embassy or the consulates,<sup>2</sup> none

<sup>1</sup> Thus they were barred from the river fronts and harbors in New York City; from travelling on ferries, excursion boats, and fishing vessels passing forts; from visiting Coney Island and other resorts in the vicinity of New York, etc. They were also excluded from residing in the District of Columbia after November 1, 1917.

<sup>2</sup> In July, 1917, all such persons (mainly clerks and servants) were notified by the department of state that their presence in the United States was undesirable, and they were requested to leave. It was felt that their loyalty to the Emperor would expose them to the temptation to endeavor to communicate military information to the German government.

were required to leave the United States. No measure of general internment was resorted to, although, as stated above, the officers and crews of German merchant vessels were placed in detention camps and from time to time suspects and persons whose presence at large was deemed to be dangerous to the public safety were similarly confined. The number, however, was not large. The great mass of Germans were left at liberty and, subject to the restrictions laid down in the two proclamations mentioned, they were free to reside where they pleased, to go and come at will, and to continue to engage in their business and professions as before the war. There were no outbreaks against the German population, and there appear to have been few reported instances of attacks against the persons or property of any alien enemy.



## CHAPTER IV

### **TREATMENT OF ENEMY ALIENS (Continued) — MEASURES IN RESPECT TO PROPERTY AND BUSINESS**

#### **A. IN GREAT BRITAIN**

§ 62. The English Custodian; § 63. The Controller.

#### **B. IN FRANCE**

§ 64. Basis of French Policy; § 65. Appointment of Sequestrators; § 66. Compulsory Declaration of Enemy Property; § 67. Powers of the Sequestrators.

#### **C. IN GERMANY**

§ 68. Early German Policy; § 69. Adoption of the Policy of Compulsory Administration of Enemy Enterprises; § 70. German Sequestration Measures in Belgium; § 71. German, British, and French Policies Compared.

#### **D. IN THE UNITED STATES**

§ 72. Policy in Respect to Business; § 73. Policy in Respect to Property; § 74. Sale of Enemy Property.

#### **E. PATENTS, TRADE-MARKS, AND COPYRIGHTS**

§ 75. British Policy; § 76. French Policy; § 77. German Policy; § 78. Legislation in the United States; § 79. The Status of Copyrights.

#### **A. IN GREAT BRITAIN**

§ 62. **The English Custodian.** The outbreak of the war found in nearly every belligerent country vast amounts of property, both real and personal, owned by persons of enemy nationality or domicile.<sup>1</sup> Likewise, enemy persons were shareholders in many business and industrial enterprises, corpora-

<sup>1</sup> According to a statement by Mr. Runciman, British minister of trade, the value of property owned by Germans in England at the outbreak of the war amounted to £96,000,000. It is stated in Clunet's *Journal de Droit International* (1917, p. 496) that German holdings in England aggregated 2,000,000,000 marks. According to the *Strassburger Post* (July 18 and 28, 1917) French holdings of landed property in Germany at the outbreak of the war amounted to 1,200,000,000 marks, and the value of French industrial enterprises in Germany ran into the "hundreds of millions." Cf. also Eccard, *Biens et Intérêts Français en Allemagne*, pp. 26-27, and Bruneau, *L'Allemagne en France* (1914).

tions, partnerships, etc. With a view to preventing such property from being used or such business from being conducted in a manner prejudicial to the national defence or for the benefit of the enemy, the governments of all the belligerent countries very early adopted measures for placing enemy-owned property and enemy business enterprises under the control or supervision of the public authorities.

In Great Britain such property was placed under government control by the Trading with the Enemy Amendment Act of November 27, 1914, which directed the board of trade to appoint a custodian of enemy property for England and Wales and another for Scotland and Ireland. For England and Wales the public trustee, an officer already in existence, was designated to perform the duties of custodian. He was charged with the duty of "receiving, holding, preserving and dealing with such property as might be paid to or vested in him in pursuance of the act." The courts were empowered to vest in the custodian any property, real or personal, belonging to, held, or managed for or on behalf of any enemy, whenever they were satisfied that such disposition was expedient. All such property was declared to be exempt from attachment or seizure in execution of judgments, although the custodian was allowed to pay debts due British subjects from the income thereof, if so ordered by the courts.<sup>1</sup> Subject to this exception, the custodian was to hold all property placed in his custody until the end of the war for the benefit of its owners, provided their own governments accorded reciprocity of treatment to British subjects. The custodian was further empowered to place on deposit with any bank, or to invest in securities approved by the Treasury, any moneys paid over to or received by him in pursuance of the Act, and any dividends or interest received on account of such deposits or investments were to be dealt with in such manner as the Treasury might direct. Any sum which, had a state of war not supervened, would have been payable to or for the benefit of an enemy subject in the form of dividends, interest, or profits, was to be paid to the

<sup>1</sup> In the case of *Krupp Aktien Gesellschaft* (1916, W. N. 234) Mr. Justice Younger held that British creditors of enemy aliens were not entitled to interest on such debts. Thereupon the rules issued in pursuance of the Act were promptly amended so as to allow interest in such cases. *Solicitors' Journal and Weekly Reporter*, Vol. 60, p. 534; *Law Times*, July 1, 1916, pp. 150-151.

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custodian and not to the enemy claimant. All holders of enemy property and all managers of companies in which enemy aliens held an interest were required to furnish the custodian within one month with full particulars concerning shares, stocks and interests held by enemy aliens in such property or companies. Creditors of enemy aliens and persons entitled to recover damages against an enemy alien were authorized to make application to the High Court for an order empowering the custodian to sell or otherwise dispose of the property of any enemy alien against which a British subject might have such a claim. The transfer by an enemy alien of any securities, debts, bills, notes, or obligations, after the outbreak of war, was declared to be illegal, unless they were bona fide transactions and made for value received before November 19.<sup>1</sup>

§ 63. **The Controller.** With a view to insuring the carrying on of enemy enterprises whenever the public interest so required, the Trading with the Enemy Act of September 18, 1914, authorized the board of trade, whenever it had reason to believe that the management of any business by an enemy alien or company was likely to be so affected by the war as to prejudice its continuance, but the carrying on of which was demanded by the public interest, to apply to the courts for the appointment of a controller of the firm or company, the said controller to have the power of a receiver or manager, subject to such restrictions as the court might think fit. By an Act of January 27, 1916, the powers of the controller were extended to embrace those of a liquidator, including the power to pay debts, distribute assets, etc.,<sup>2</sup> and the board of trade was empowered, whenever it appeared that the business of any person, firm, or company was by reason of its enemy nationality or the nationality of its members being carried on wholly or mainly for the benefit of, or was under the control of, enemy subjects, to prohibit or wind up such business.<sup>3</sup> Already by a proclama-

<sup>1</sup> Text of the Act in Pulling's *Manual of Emergency Legislation*, Supp. II, pp. 19-27. In May, 1916, the custodians reported that the total value of enemy property, including debts, notified or vested in them, amounted to £134,000,000. *Solicitors' Journal and Weekly Reporter*, May 13, 1916, p. 472.

<sup>2</sup> His powers were judicially interpreted in the case of *Hazelberg Aktien Gesellschaft*, W. N. (1916), and are analyzed in the *Law Times* of November 4, 1916, pp. 141-142.

<sup>3</sup> It will be noted that no application to the courts for an order to wind up such business was required. This feature of the law is criticised by the *Solicitors'*

tion of August 10, 1914, enemy aliens had been prohibited from engaging in the business of banking, except with the written permission of a secretary of state and subject to such conditions and restrictions as he might prescribe. The proclamation further prohibited enemy alien banks from parting with any money or securities and required them to deposit the same in such custody as they might be directed. The power conferred on the board of trade by the Act of January 27, 1916, was freely exercised, and hundreds of enemy companies and business enterprises were closed, and large quantities of German-owned property appear to have been sold at auction by the public trustee.<sup>1</sup>

#### B. IN FRANCE

§ 64. **Basis of French Policy.** French policy in respect to enemy property and business enterprises was similar in principle to that of the British government. The decree of September 27, 1914, which corresponds to the British Trading with the Enemy Act, made no provision for placing enemy property under the control of a public custodian nor for putting the management of enemy business enterprises in the hands of a controller. Nevertheless, it was assumed at the outset that the government must exercise control over all such property and enterprises in the interest of both the national defence and the maintenance of the economic life of the nation.<sup>2</sup> Moreover, it was contended that such a policy was justified as a legitimate measure of retaliation against Germany for having closed her courts to French citizens and for having placed certain French houses in Germany under sequestration.<sup>3</sup> In France proceedings against enemy property and business enterprises

*Journal and Weekly Reporter*, Vol. 60, p. 216. Cf. also the *Law Quarterly Review*, Vol. 32, p. 249.

<sup>1</sup> By July 8, 1916, two hundred companies and firms had been wound up. *Solicitors' Journal and Weekly Reporter*, July 8, 1916, p. 598. There was much complaint in England that some of the German banks in London were allowed to operate and even to advertise their business in German newspapers. Lord Northcliffe's attack upon the government for its failure to wind them up contributed to the downfall of the Asquith ministry. Cf. the correspondence between Lord Northcliffe and Mr. McKenna in the London weekly *Times* of November 17, 1916.

<sup>2</sup> Cf. Valéry, *De la Condition en France des Ressortissants des Puissances Ennemies*, 23 *Rev. Gén. de Droit Int. Pub.*, 374 ff., and 43 *Clunet*, p. 7.

<sup>3</sup> Cf. Valéry, article cited, who emphasizes the character of the French measures as a legitimate act of reprisal for the German pillage and confiscation of

were initiated, not by Parliament, but by the courts in the exercise of their common law jurisdiction,<sup>1</sup> although regulations were issued by the government from time to time for the guidance of the courts and the *parquets* in exercising their powers of control.<sup>2</sup>

§ 65. **Appointment of Sequestrators.** With the departure from France of German and Austro-Hungarian subjects at the outbreak of the war and the abandonment of their property, French creditors applied to the courts for the appointment of *administrateurs-séquestrateurs* of the property thus abandoned with a view to insuring its conservation and the ultimate recovery therefrom of the sums due them. Likewise the *parquets* took the initiative in applying to the courts for writs of attachment of goods and merchandise belonging to enemy houses of trade, irrespective of whether the owners were in France or had departed. The first court to act upon such applications was the civil tribunal at Havre, which on October 2, 1914, issued an order for the seizure of the merchandise belonging to a German house in that city,<sup>3</sup> this partly for the purpose of preventing it from finding its way to the enemy and partly upon grounds of general public policy.<sup>4</sup> This mode of procedure in respect to enemy property commended itself to the minister of justice, and on October 8 he communicated the text of the decision of the tribunal of Havre to the various *parquets*, with the suggestion that, as it seemed to be of such a nature as to

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private property in France; also Fauchille, *Les Attentats Allemands contre les Biens et contre les Personnes en Belgique et en France*, *ibid.*, 1915, pp. 257 ff., and Reulos, *Manuel des Séquestres*, p. 2. In fact, however, the German government had only excluded from access to its courts enemy subjects domiciled *outside* the Empire. Frenchmen domiciled *within* the Empire were free to sue in the German courts.

<sup>1</sup> The Germans complained that the policy of sequestration adopted by the French courts was illegal, but Reulos (*Les Séquestres et la Gestion des Biens des Sujets Ennemis en France*, 44 Clunet, 24 ff.) shows that this policy was entirely in accord with the established practice of the French courts in dealing with abandoned property or property held by persons who for reasons of public policy should not be left in control of it.

<sup>2</sup> The various circulars and decrees relating to the matter may be found in Reulos, *Manuel des Séquestres*; Dalloz, *Guerre de 1917*, and a collection entitled *Législation de la Guerre de 1914* (Librairie de Soc. du Recueil Sirey). Cf. also Signorel, *Le Statut des Sujets Ennemis* (1916), pp. 128 ff; and an article by M. Audinet in 44 Clunet, 1601 ff. and 45 *ibid.*, 51 ff.

<sup>3</sup> Text in Reulos, pp. 42-43, and 42 Clunet, 419 ff.

<sup>4</sup> Troimaux, *Séquestres et Séquestrés*, p. 3.

"constitute jurisprudence," it be brought to the attention of the presidents of the tribunals and the procurators of their districts.<sup>1</sup> By a circular of October 13, M. Briand, then minister of justice, went further and "invited" the presidents of the courts of appeal and the procurators-general to proceed to seize and to put under sequestration all goods and merchandise, all funds (*deniers*), and generally all movable and immovable property belonging to or held by or for any German or Austro-Hungarian houses of trade, industry, or agriculture in France, whether such houses had ceased their operations or not, since the outbreak of the war.<sup>2</sup>

For certain reasons of public policy, natives of Alsace-Lorraine, Poles, and Czechs were often in fact exempted from the operation of the sequestration measures.<sup>3</sup> The whole matter of the treatment of persons belonging to these races was left to the discretion of the courts. In each case an effort was made to distinguish between the "desirables" and the "undesirables," the former being exempted.<sup>4</sup> The possession of a *permis de séjour* was usually accepted as a presumption that the holder belonged to the first category. Likewise, the policy of sequestration does not appear to have been rigorously enforced against the property of certain Ottoman subjects, notably Syrians. As the sequestration measures applied to the property of all persons residing or domiciled in Germany and Austria-Hungary, it happened that property in France owned by a Frenchman residing in Germany was subject to sequestration. The tribunal of the Seine also held that the property of naturalized Frenchmen of German origin who had left France and returned to Germany at the outbreak of the war was subject to sequestration even before their denaturalization by the French government had been pronounced.<sup>5</sup>

§ 66. **Compulsory Declaration of Enemy Property.** By a law of January 22, 1916, all holders, administrators, guardians,

<sup>1</sup> Text in Reulos, pp. 41-42.

<sup>2</sup> The law of January 22, 1916, provided that French holders or managers of enemy property should upon their request be considered as sequestrators of the property in their possession, and such property should be regarded as under their care. They were "sequestrators by law" as contradistinguished from "judicial sequestrators" who were appointed by the courts.

<sup>3</sup> Cf. a circular of the minister of justice of October 14, 1914.

<sup>4</sup> Cf. Troimaux, pp. 87 ff. and 105 ff.

<sup>5</sup> Reulos, p. 231.

or surveillants of property belonging to the subjects of an enemy power, and all debtors of enemy subjects, were required to make a detailed declaration concerning the amount and character of such property or debts. The obligation applied to all interests of whatever character held by enemy subjects in houses of trade, enterprises, or exploitations, as well as all agreements or contracts of an economic character between persons residing in French territory and subjects of an enemy power. The declarations were to be made to the procurators and officials of the judicial police, and failure to do so within the prescribed period was punishable by imprisonment of from one to five years and by a fine of from 500 to 20,000 francs.<sup>1</sup>

§ 67. **Powers of the Sequestrators.** The functions of the *administrateurs-séquestrateurs* were in principle similar to those of the English custodian. Again and again the minister of justice, in the circulars which he issued for their guidance, reminded them that their rôle was mainly that of conservators.<sup>2</sup> They were merely the guardians and custodians of the property placed in their charge and were to hold and preserve it as an "economic hostage" until the end of the war, with a view to protecting the eventual rights of French creditors and those of the allies of France and of neutral countries, and also to prevent its being used to the prejudice of the national defence. The income of the property held by them was to be received, and out of it the debts due by the owners to French creditors were to be paid. The remainder was to be deposited in the public treasury. Unlike the English controller, they had no general power to operate, or wind up the affairs of, business concerns.<sup>3</sup> Nevertheless, whenever the public interest required the closing of an enemy enterprise or its continued operation for the manufacture or production of commodities needed for military or other purposes, the courts might direct that one

<sup>1</sup> Cf. Reulos, pp. 32 ff., for the text, and Troimaux, pp. 147 ff., for a discussion of the nature and purpose of the law. Troimaux details some of the ingenious ruses adopted by German houses and property owners to avoid the sequestration measures (pp. 117 ff.).

<sup>2</sup> This restricted view of their powers was affirmed by the French courts in many cases. Many of these decisions may be found in the *Journal du Droit International*, edited by M. Clunet; in Reulos, *op. cit.*, Part III, and in Troimaux, *op. cit.*, pp. 55 ff. The two latter treatises contain analyses and comment on the French decisions.

<sup>3</sup> Decision of the tribunal of Oran, 43 Clunet, 1916, p. 967.



or the other policy be followed; in the former case the court appointed a liquidator, and in the latter an *administrateur-séquestrateur* to carry on the business.<sup>1</sup> In France, therefore, contrary to English procedure, no enemy business could be closed and its affairs wound up except by an order of the court. Likewise, except in case of absolute necessity, as, for example, where the sequestered goods were perishable or were subject to debts or other incumbrances which required to be discharged immediately, or where military or economic considerations made it imperative or highly desirable, the assets of property in the hands of a sequestrator could not be alienated, sold, or otherwise disposed of except upon an order of the court.<sup>2</sup> Sequestrators were required to keep accounts of the receipts and expenditures and make detailed reports to the courts, to whose control their activities were largely subject. They were admonished to exercise care and economy in the discharge of their duties and to use every effort to preserve the property in the same condition in which they received it. All dividends or other income from sequestered property were required to be paid over to the *Caisse des Dépôts et Consignations* to be held by it for the eventual benefit of the owners, and no proceeds from enemy property were employed in France for subscriptions to war loans, as was done in Germany and the United States. The expense entailed by the administration of the sequestration policy was borne by the property sequestered. The Germans alleged that this expense was so large as to consume in many cases the larger part of the property, but this charge was denied by the French authorities, who assert that there was practically no expense, except registration fees in case of sales.

#### C. IN GERMANY

§ 68. **Early German Policy.** As has been said, the French government justified its policy of sequestration partly upon

<sup>1</sup> Circular of the minister of justice, November 3, 1914. Text in Reulos, pp. 63 ff.

<sup>2</sup> Circular of November 14, 1914, Reulos, pp. 74 ff.

There appears to have been a few sales of personal property (Clunet, 1917, p. 35), but I have found no instance of the sale of real estate. The amount of enemy property put under sequestration in France was very large. In October, 1916, there were 173 sequestrators in the department of the Seine alone, and they had under their control the property and interests of 8000 enemy persons or companies, the total amount of which aggregated over two billion francs. Troi-maux, *op. cit.*, p. 172, and 44 Clunet, 93-95.



considerations of national defence, partly as a necessary measure for the protection of French creditors and the maintenance of the economic life of the nation, and partly as a legitimate measure of retaliation for the German decree of August 7, 1914, excluding French nationals and establishments domiciled outside the Empire from access to the German courts.<sup>1</sup> The French measures of sequestration, as well as those of the British government, aroused strong resentment in Germany, where they were denounced as a violation of the law of nations, which establishes the immunity of private property in land warfare.<sup>2</sup> By way of reprisal<sup>3</sup> (*im Wege Vergeltung*), therefore, the German *Bundesrath* adopted an ordinance on September 4, 1914, empowering (but not requiring) the central authorities of the several States of the Empire to establish a régime of supervision over enemy enterprises (*Unternehmungen*) situated within their respective territories, including all branches of enemy houses which were directed or controlled by persons of enemy nationality or the funds of which were destined for transmission to enemy countries. This supervision was to be exercised by *surveillants* or supervisors (*Aufsicht Personen*) appointed by the government and at the expense of the enterprise. They were to see that no business was carried on during the war by

<sup>1</sup> The French text of the German decree of August 7 may be found in Reulos, p. 478. The French seem to have been under the impression that the German decree closed the German courts to all Frenchmen, whether domiciled within or without the Empire. In fact, as stated above, it applied only to those domiciled *outside* the Empire.

<sup>2</sup> Cf. the *Norddeutsche Zeitung* of November 30, 1914. The same paper, in its issue of April 14, 1917, published an official notice which complained that from the outset the French had sequestered not only the property of German commercial enterprises, but also the goods of private individuals; that the French policy was ruinous and wasteful, and that important enterprises in which Germans held an interest had been put up for sale in a lump and sold to the French partners at nominal prices. M. Reulos, in 44 *Clunet* 26 ff., denies the German charges.

The above and other similar charges in respect to the treatment of German property in France are made by Hans Reichel, of Zurich, in the *Juristische Wochenschrift* of Berlin for May 1, 1915, p. 471. There is a French translation of his article in 44 *Clunet*, 489 ff., by M. Dreyfus, who likewise denies the German charges.

<sup>3</sup> In view of the fact, however, that the French policy of sequestration was not inaugurated until October, 1914, it is difficult to see how the German ordinance of September 4 can be defended as an act of reprisal against the French measures of sequestration. Cf. an article entitled *Les Séquestres des Biens des Sujets Ennemis en Allemagne*, 43 *Clunet*, 1546 ff., and an article by Reulos, 44 *ibid.*, 26 ff.

such enterprises, but the property and other private rights of the enterprise were not to be impaired. Supervisors, therefore, had no power to liquidate or wind up its affairs or to manage or operate it. The exploitation of the enterprise might be carried on as before the war, but its directors and employees were required to conform to the rules and decisions of the supervisors. The supervisor was given power to control the transactions of the undertaking, especially those involving the disposition of property and the transmission of communications; to inspect papers, audit accounts, make inventories, and require information regarding all transactions. No money or other property of an undertaking placed under supervision could in general be transmitted to an enemy country, but the supervisor was authorized to make exceptions to this rule in appropriate cases. He might also direct that such money or securities be deposited in the Imperial bank to the credit of the enterprise. Violation of the terms of the decree was punishable by a fine not exceeding 50,000 marks or imprisonment not exceeding three years or both.<sup>1</sup>

§ 69. **Adoption of the Policy of Compulsory Administration of Enemy Enterprises.** By an ordinance of October 22, 1914, establishments or branch houses which had been placed under supervision in pursuance of the above-mentioned decree and which did not have in Germany a head or agent qualified to perform legal acts in respect to such establishments or branch houses, were placed under a régime of compulsory administration (*Zwangsweiserverwaltung*). For each such enterprise a manager (*Verwalter*) was to be appointed by the court of first instance (*Amtsgericht*) upon the nomination of the supervisor. He was empowered to manage, subject to the direction of the supervisor, the affairs of the enterprise and to exercise all the

<sup>1</sup> The text of this and other decrees, laws, circulars of instruction, etc., may be found in a German collection entitled *Die Kriegsnotgesetze, Sammlung der wichtigen Gesetze, Verordnungen und Erlasse*, published by Carl Heymann, Berlin. See Vol. I, pp. 137-139, for the text of the above decree. The French text of this and other decrees relating to the treatment of enemy property in Germany may be found in Reulos, *op. cit.*, pp. 478 ff. See also 44 Clunet, 77-78, and Eccard, *Biens et Intérêts Français*.

The number of decrees and circulars issued by the German government in respect to enemy property and enterprises was very large. Clunet (1917, p. 385) gives a list of seventeen such decrees and ordinances. An analysis of the more important of them may be found in Senate Document No. 107, 65th Cong., 1st sess., entitled "Trading with the Enemy," by Theo. H. Thiesing, of the Library of Congress.

powers of the owner or his agent. During the period of forced administration the owner or his agents were disqualified from performing any legal acts in connection with the business.<sup>1</sup> By an ordinance of November 26, 1914, the *Bundesrath* went still further and, by way of reprisal, authorized (but did not require) the central administrative authorities of the States, with the assent of the Chancellor, to place under the régime of forced administration all enterprises as well as their branches, and all immovable property owned wholly or in preponderating part by persons of French nationality.<sup>2</sup> An administrator (not necessarily a public functionary) appointed by the government was to be put in control of the enterprise or property, with almost absolute authority, to act in the name of the owner or manager. He alone could sue in the name of the enterprise and could remove and appoint directors and employees. He could operate the enterprise permanently or temporarily with a view to winding up its affairs. Upon the request of a German shareholder or partner, and with the approval of the state authorities, he could proceed to dissolve the company or partnership and liquidate its affairs, in which case a liquidator appointed by him was put in control.<sup>3</sup> The latter could alienate the property wholly or in part, pay its debts, and deposit the

<sup>1</sup> German text in *Die Kriegsnotgesetze*, Heft 2, p. 1; French text in Reulos, p. 486. German creditors of enemy subjects were entitled to institute proceedings in the courts by way of execution against property belonging to the latter and which had been placed under sequestration. Cf. a decision of the *Oberlandesgericht* of Colmar, May 12, 1915, Soergel, *Kriegsrechtssprechung und Kriegsrechtslehre*, p. 115, and a decision of the *Landgericht* of Berlin, March 22, 1915, *ibid.*, p. 115. Controllers of enemy firms could sue in the name of the firm in respect to its affairs. *Ibid.*, p. 206. As to the powers of managers of enemy firms, cf. a decision of the Prussian *Kammergericht* in May, 1916, text in 44 *Clunet*, 266 ff.

<sup>2</sup> It will be seen that enemy interest, and not the domicile of the French shareholders or partners, was made the test. It was immaterial whether the latter had their domicile in German, enemy, or neutral territory.

<sup>3</sup> French writers complained of the German procedure of dissolving mixed companies, a majority of the stock of which was owned by French partners, upon the request of a single German partner. Cf. the opinion of the Hamburg *Landgericht* of July 1, 1915, in Soergel, *Kriegsrechtssprechung und Kriegsrechtslehre*, p. 25, where a house of trade composed of three partners, of whom two were English and the third German, was dissolved upon the petition of the German partner. The tribunal of the Seine declined to order a dissolution in a similar case. Reulos, *La Séquestration et la Gestion des Biens des Sujets Ennemis en France*, 44 *Clunet*, 38-39. Cf. also an article from the Berlin *Tageblatt* of August 18, 1916. (French translation in 44 *Clunet*, 492.)

balance with the government. The state authorities were authorized to permit payments to enemy owners and partners domiciled in Germany as far as necessary for their support. During the period of sequestration all powers and rights of the directors, shareholders, and partners were suspended. The expense of administration was to be paid out of the assets or income of the business. If after liquidation any balance remained, the amount due French subjects was to be deposited in the Imperial bank to their account.<sup>1</sup>

Following British and French practice, the German government, by a decree of October 7, 1915, required an obligatory declaration of all enemy property, including shares of stock and claims against persons domiciled in the Empire. The declaration was required to be made by the owner or holder to such officials as the state governments might designate. Heavy penalties were prescribed for failure to make the required declaration or for false or inexact returns.<sup>2</sup> Although in terms this ordinance applied only to French enterprises, the Chancellor was authorized by section 9 to extend by way of reprisal its provisions to the subjects of other enemy States, and in fact they were so extended to apply to the subjects of Great Britain, Russia, Portugal, Italy, Roumania, and the United States. By an ordinance of July 31, 1916, issued by the *Bundesrath*, the Chancellor was authorized to order the liquidation of all enterprises or branch houses whose capital was owned wholly or in major part by English subjects, or which were until the outbreak of the war directed or supervised from places within British territory. The procedure of liquidation and the function of liquidators were essentially the same as those under the ordinance of November 26, 1914, relating to the liquidation of French concerns.<sup>3</sup>

<sup>1</sup> Text in *Kriegsnotgesetze*, Heft 2, p. 3. A detailed analysis of the above-mentioned ordinances, with general comment on the German policy in respect to the treatment of enemy property, may be found in a series of articles entitled *Régime Juridique des Biens Ennemis en Allemagne*, in 44 *Clunet*, 385 ff. and 875 ff., by Giesker-Zeller of Zurich. There is also a review and defence of German policy in an article by Dr. Haber, of Leipzig, in the *Juristische Wochenschrift* of April 15, 1916. (French translation in 43 *Clunet*, 448 ff.)

<sup>2</sup> French text in 44 *Clunet*, 1523 ff.

<sup>3</sup> Text in Reulos, pp. 491-493, and Eccard, pp. 261-263. In November, 1917, the provisions of this decree were extended to apply to the property and claims of American citizens.

§ 70. German Sequestration Measures in Belgium. By a decree of the governor-general of Belgium of February 17, 1915, enemy houses and branches of enemy houses were placed under a régime of compulsory administration. Embraced within this category were those whose directors or managers were subjects of enemy countries, those one-third of the capital, property, or direction of which was in enemy hands, those whose principal business was in enemy territory, those the management of which by Germans was required by the interests of Germany, and those whose exploitation was calculated to affect injuriously the interests of the German Empire. Administrators were to be appointed by the commissioner-general of banks, and they were to take the place and perform the duties of the existing directors, the rights of owners, agents, and directors being suspended during the period of sequestration. All expense of administration, including the salaries of the sequestrators, was to be borne by the house or business sequestered.<sup>1</sup> By a decree of August 29, 1916, the governor-general directed that any British concern of which the greater part of the capital belonged to British subjects, or whose directorate or management had its headquarters in British territory, might be liquidated and its affairs wound up. The power to order the liquidation of a concern was conferred on the chief civil administrator (*Verwaltungschef*) and the commissioner-general of banks, but their orders required the approval of the governor-general. The liquidator was empowered to take possession of the concern and might alienate it *en bloc* or sell particular shares. The offence of secreting or concealing property subject to liquidation, or of furnishing false information, was punishable by a fine not exceeding 100,000 marks and imprisonment for not more than five years, or both, and the military courts were given jurisdiction of infractions of the decree.<sup>2</sup> The measure appears to have been one of confiscation, and it was characterized by the British secretary of state for foreign affairs as "a violation of the principles of international law." The secretary of state also stated that he had received reliable information that the German government had ordered certain establishments to hand over

<sup>1</sup> Text of the decree in 43 *Clunet*, 682-684.

<sup>2</sup> Text in *Bulletin Officiel des Lois et Arrêts*, September 13, 1916. English translation in *New York Times*, November 14, 1916.

to the *Reichsbank* the balances of current accounts standing in the names of French and British nationals.<sup>1</sup>

§ 71. **German, British, and French Policies Compared.** Comparing German policy in respect to the treatment of enemy property with that of Great Britain and France, we must admit that, in the beginning at any rate, it was more liberal and more in accord with Rousseau's theory that war is a contest between armies and not peoples.<sup>2</sup> German writers claim that Germany was driven to adopt the policy of compulsory administration and liquidation as a measure of reprisal against France for putting German enterprises and property under sequestration. France, they contend, was not justified in resorting to this extreme measure because the German government had temporarily closed its courts to Frenchmen domiciled outside the Empire. As a matter of fact, they assert, the courts were open practically without restriction to all enemy subjects domiciled in German territory. In the beginning Germany took no action whatever against enemy property or business undertakings, and even after it was known in Germany that the French courts were proceeding to sequester German property and houses of trade, the Germans went no further than to place French undertakings under supervision. Unlike the French measures, it was said, this policy of surveillance did not generally prohibit the carrying on by their owners or agents of French business enterprises in German territory. The official supervisors under whose oversight these enterprises were placed were limited mainly to seeing that the business was not operated to the detriment of the national interests. There was no seizure of enemy goods and no serious interference with the management of enemy houses of trade or business undertakings. It was only after

<sup>1</sup> *International Law Notes*, May, 1917, p. 73.

<sup>2</sup> In this connection, attention may be called to a decision rendered by the *Reichsgericht* on October 26, 1914, which said: "The German law of nations does not admit the view of certain foreign codes according to which war from the economic point of view must be extended to the subjects of the enemy States. It starts from the contrary principle that war is made solely against the enemy *State* as such and that the subjects of an enemy State are assimilated from the civil point of view to nationals in the same measure as they were before the war, except in so far as otherwise exceptionally provided for by law." The court admitted, however, that this principle might be derogated from by exception as a measure of reprisal. Text in Soergel, *Rechtssprechung*, p. 75; also quoted by Curti in an article entitled *De la Condition des Sujets Ennemis selon la Législation et la Jurisprudence Allemandes*, in 42 *Clunet*, 785 ff.



the French policy of wholesale sequestration had been adopted and put into effect that Germany felt obliged as a measure of reprisal to resort to a similar policy, as she did by the decree of November 26, 1914.

Having once inaugurated the régime of compulsory administration, the Germans appear to have carried it out with their usual thoroughness. Loud complaints were made in France that the German measures against French houses and property were arbitrary, wasteful, confiscatory, and entirely unjustified by anything the French had done. German administrators, it was pointed out, were neither appointed by nor subject to the control of the courts, as were the sequestrators in France; consequently, they were free to deal with enemy property and enterprises as they pleased. The French policy of sequestration, it was said, had been adopted mainly with a view to conserving enemy property from waste or destruction and for preventing its use for the benefit of the enemy; in Germany, on the contrary, the policy of forced administration was resorted to as a weapon of war; it had the character of spoliation, and in the case of Belgium in particular it amounted in effect to confiscation.<sup>1</sup> German policy in respect to French property and enterprises in Alsace-Lorraine especially has been the subject of severe criticism by French writers. German administrators were put in control of thousands of French houses and enterprises; many of them were wound up and their affairs liquidated, and charges were made that their funds in some cases were used by the German authorities for forced subscriptions to war loans.<sup>2</sup> Liquidations and forced sales appear to have greatly multiplied under the administration of Chancellor von Hertling, and throughout the autumn of 1917 the columns of German newspapers were filled with advertisements of the sales of French houses and estates. These measures, it is alleged, were ap-

<sup>1</sup> The character of German and French measures is contrasted in M. Eccard's *Biens et Intérêts Français en Allemagne et en Alsace-Lorraine* (1917). French interests in Alsace-Lorraine were of course extensive, and the value of French property holdings was enormous. M. Eccard quotes from a statistical summary published in the *Strassburger Post* during the summer of 1915 to the effect that 12,000 hectares of cultivated land in Lorraine, 600 houses at Metz, 128 houses at Strasburg, 58 at Hagenau, and immovable property to the value of 20,000,000 francs at Mulhouse had been sequestered and placed under the régime of forced administration. Eccard, *op. cit.*, p. 20.

<sup>2</sup> 42 *Clunet*, 1078-1079; 43 *ibid.*, 1547.



plied not only to French nationals, but also to German subjects in Alsace-Lorraine whose sons had emigrated to France or were serving in the French army, and to Alsatian families who were "affiliated" with individuals or families of French nationality. This policy of spoliation and confiscation — for such it was in effect — was at first defended as a legitimate measure of reprisal, but in consequence of the refusal of the French government to resort to the policy of confiscation, the German authorities ceased to invoke the excuse of reprisal and defended the German policy on the ground that it was in the "interests of the Empire."<sup>1</sup>

#### D. IN THE UNITED STATES

**§ 72. Policy in Respect to Business.** The policy of the United States followed the general lines adopted in Great Britain and France, although there were some important differences. The legislation in respect to the treatment of enemy business undertakings and property is for the most part found in the Trading with the Enemy Act of October 6, 1917, and in the various executive orders issued by the President in pursuance of the authority conferred upon him by this Act. In respect to the conduct of enemy business in the United States, the Act empowered every enemy or ally of enemy insurance company and every enemy or ally of enemy doing business in the United States through an agency or branch office or otherwise, to apply to the President of the United States for a license to continue his business. The President was authorized to grant or refuse licenses and to revoke those once granted in his discretion. The power thus conferred on the President was in turn delegated by him to the war trade board.<sup>2</sup>

The license thus authorized might specify the conditions under which the business should be carried on and prescribe regulations for the control and disposition of the company's funds. The President was further empowered to prohibit any or all foreign insurance companies from doing business in the United States whenever in his opinion the public safety or public

<sup>1</sup> *New York Times*, October 22, 1917.

<sup>2</sup> Whenever the board refused to grant a license, the alien property custodian took charge of the business and managed, operated, or liquidated its affairs. A large number of licenses appear to have been granted with a view to liquidation under the management and control of the custodian.

interest might so require.<sup>1</sup> No provision was made for the appointment of controllers, managers, administrators, sequestrators, and the like, as was done in other countries. Instead of following the German policy of compulsory administration through the agency of a government appointed administrator, American policy was to require a reorganization of the directorate in the case of enterprises in which the board of directors was composed wholly or in part of enemy subjects. In such cases the alien property custodian took possession of the enemy interests in the enterprise and appointed American directors to represent such interests, or an entirely new board in case the business was wholly enemy-owned, and the board as thus reorganized carried on the business as before.<sup>2</sup>

By an executive order issued by the President on February 26, 1918, prescribing rules and regulations concerning the duties of the custodian, the latter, however, was authorized to "manage, conduct, and operate" any enemy business wherever its continuation "seemed to be necessary to prevent waste or to protect such business," and in the management, conduct, or operation of such business he was authorized to exercise "every right, power, and authority of the enemy."

§ 73. **Policy in Respect to Property.** As to the treatment of enemy-owned property in the United States, the Trading with the Enemy Act authorized the President to appoint an "alien property custodian" with power to receive all money and other property in the United States due or belonging to

<sup>1</sup> This power was delegated by the President to the treasury department, and in pursuance of this authority an order was issued by the department on November 26, 1917, prohibiting all enemy and ally of enemy insurance companies, except those engaged in the business of life insurance, from doing business in the United States. Life insurance companies were permitted to carry out their existing contracts, but were forbidden to write new business. The affairs of all others were wound up and liquidated. By an executive order of November 12, 1918, the custodian was given authority to take over the assets and affairs of all enemy insurance companies then in the process of liquidation. It was announced that their stock would be sold at public auction. Already, on July 14, 1917, the President had issued a proclamation prohibiting companies engaged in the business of marine and war risk insurance from continuing their business, and declaring that their existing contracts should be suspended during the period of the war. The purpose of the measure was to prevent information regarding the movement of American vessels from reaching Germany through the agents of such companies, who had a right to inspect all vessels upon which they carried insurance.

<sup>2</sup> See a report of the custodian to the President, in the *Official Bulletin*, January 26, 1918.

an enemy or ally of an enemy, which might be paid, conveyed, transferred, assigned, or delivered to him, and to hold, administer, and account for the same under the general direction of the President.<sup>1</sup> Every corporation and every unincorporated association, company, or trustee, issuing shares or certificates representing beneficial interests, was required within sixty days to transmit to the custodian a list of the officers, directors, or stockholders of enemy or allied nationality residing within or without the United States, of such corporation or company, together with a statement of the amount of their holdings. All persons holding property for or on behalf of an enemy or ally of an enemy, or indebted to such person, were required to report the fact within thirty days to the custodian with such particulars as the latter officer might require, and the President was empowered to require any money or other property due or belonging to an enemy or ally of an enemy not holding a license, to be paid over and delivered to the custodian. Any payment, conveyance, or delivery of money or other property to the custodian was to be a full acquittance and discharge of the obligation of the person making it. The custodian was required to deposit in the treasury of the United States all moneys paid to or received by him, and the secretary of the treasury was authorized to invest the same in United States bonds or certificates of indebtedness under such regulations as the President might prescribe.<sup>2</sup>

<sup>1</sup> The law was interpreted to apply to property in the United States owned or controlled by any and all persons residing or domiciled in the territory of the enemy or ally of an enemy, even when the owner was an American citizen. In a number of instances vast properties owned by American citizens of German origin, who at the time were in Germany, were taken over by the custodian. Likewise the property holdings of a number of wealthy American women who had married German or Austrian subjects were taken over. In the former case the domicile of the owner was adopted as the test of the liability of his property to sequestration; in the latter case the citizenship of the owner was made the test.

By an executive order of February 5, 1918, German and Austro-Hungarian subjects who had been interned and were in the custody of the war department were declared to be "enemies" within the sense of the Trading with the Enemy Act. Their property was therefore subject to seizure by the alien property custodian. By an executive order of May 31, 1918, the custodian was authorized to take over property in the United States of enemies interned in England and France, of persons who since April 6 were guilty of disseminating enemy propaganda, of persons whose names were on the enemy trading list, and of persons who at any time since April 4, 1914, had been resident within enemy territory.

<sup>2</sup> Down to July 31, 1918, \$42,970,027 of such funds had been invested in liberty bonds (*Off. Bul.*, August 6, 1918). The total amount of enemy property taken over by the custodian was valued at more than \$800,000,000.

All other property placed in the hands of the custodian was to be "safely held and administered" by him. The custodian was vested with all the powers of a common law trustee in respect to property, other than money, placed in his possession, and subject to such rules and regulations as the President might prescribe; he was authorized to manage and dispose of it by sale or otherwise, or exercise rights appurtenant thereto, including sale, whenever it was regarded as necessary to protect it, prevent waste, and safeguard the interests of the United States therein.

Comparing the powers of the American custodian with those of the corresponding official in England, France, and Germany, we note several differences. Compared with the English custodian, his powers were somewhat larger, since he was not limited to receiving enemy property vested in him by the courts, but could take possession without judicial authorization; furthermore he had the power to wind up the affairs of any concern or estate in which an enemy subject had an interest, whereas in England the latter power belonged to the board of trade and not to the custodian. Unlike the French sequestrator, he was not subject to the control of the courts, except as any trustee is, but was under the supervision and direction of the President. On the whole, his powers appear to have been more like those of the German administrator (*Zwangsverwalter*).

§ 74. **Sale of Enemy Property.** The Trading with the Enemy Act appears not to have intended to give the custodian any general power to sell enemy property further than was necessary to protect it against waste and to preserve the interests of the United States in the same.<sup>1</sup> But by a clause in the urgent deficiency bill, approved March 28, 1918, the custodian was given a general power to sell any property in his custody, subject to the condition that it must be sold only to American citizens and in public to the highest bidder, unless the President should otherwise direct. By an executive order of April 2 the President authorized the custodian to sell at private sale and without advertisement a large number of articles of personal property. The policy of the custodian was to sell only such articles as cotton, tobacco, grain, etc. The avowed purpose of the measure conferring upon the custodian the gen-

<sup>1</sup> § 12, par. 4.

eral power of sale was to destroy the enormous financial power which had been built up in the United States by Germans resident in Germany, and to root out German influence.

It does not in fact appear that the property of any German subject residing in the United States, or not actually engaged in making war against the United States or not interned, was seized or sold.<sup>1</sup> Seizures and sales were in the main limited to property owned, not by enemy aliens residing in the United States, but by enemy subjects residing or domiciled in the enemy country and embracing persons actually engaged in making war against the government and people of the United States. It is not clear from the terms of the text or from the debates what was intended to be the eventual disposition of the proceeds from the sale of such property. If it was intended that the proceeds should be held in trust for the benefit of the owners, with whom an accounting should be made at the close of the war, the act may be justified, although it is difficult to see what military purpose was subserved by it. If, on the contrary, no such restitution was contemplated or intended, the measure was one of plain confiscation, and it is hard to see how it can be reconciled with the established rule of international law in respect to the immunity of private property in land warfare. Nevertheless, it might be argued, and was in fact argued during the debates in the Senate, that the confiscation of German-owned property in the United States was a justifiable measure of reprisal for Germany's conduct in destroying unlawfully the lives and property of American citizens on the high seas.

Apparently it was the intention of Congress that the whole question of restitution should be left for determination by the treaty of peace at the conclusion of the war, the idea being that a claim would be presented to Germany for damages on account of the unlawful destruction of American lives and property at sea by the German naval forces, and a balance struck between the amount so claimed and the amount of the proceeds derived from the sale of German-owned property in the United States.

<sup>1</sup> In November, 1917, the custodian gave public assurances, in consequence of a report that heavy withdrawals by Austrians and Hungarians of their bank deposits were contemplated, that the government had no intention of seizing such funds and that there was no thought of confiscating or dissipating the property of enemy aliens residing in the United States. *New York Times*, November 14 and December 10, 1917.

It was rather a measure of reprisal resorted to with a view to obtaining from the enemy's resources funds out of which to indemnify citizens of the United States for injuries and losses of life and property sustained by them in consequence of unlawful methods of warfare practised by an enemy which refused to conform his operations to the recognized laws of war. As is well known, Germany at the close of the Franco-German war of 1870-1871 demanded and secured an indemnity from France for certain acts which the German government insisted were contrary to the established rules of international law.<sup>1</sup>

In the meantime the recourse of reprisal against the United States was open to Germany. In fact, the German government in March, 1918, caused the American government to be informed that it would adopt measures against American-owned property in Germany, similar to those taken by the government of the United States against German property,<sup>2</sup> and in October it filed a formal protest against the American policy of selling German property and especially against the authority given the President to dispose of the North German Lloyd and Hamburg-American steamship establishments in New Jersey — this on the ground that it was in violation of the spirit of the treaties of 1799 and 1828.<sup>3</sup>

#### E. PATENTS, TRADE-MARKS, AND COPYRIGHTS

§ 75. **British Policy.** The policy of dealing with the peculiar species of property in the form of patents, trade-marks, designs,

<sup>1</sup> The treaty of peace with Germany (1919) provided among other things that the nationals of the allied and associated powers should be entitled to compensation from Germany for damages and injury inflicted upon their property in German territory, the amount to be determined by a mixed arbitral tribunal and might be charged upon the property of German nationals within the territory or under the control of the claimant's state; that no claim should be made by Germany against any allied or associated power in respect to any act done by them with regard to enemy property; and that Germany should undertake to compensate her own nationals for losses or injuries sustained by them in consequence of measures adopted by the allied governments in respect to enemy property within their territories (Arts. 297-298).

<sup>2</sup> *New York Times*, March 19, 1918. Already, in October, 1917, the German decrees in respect to compulsory notification and administration of enemy-owned property were extended to apply to American property in the Empire. *New York Times*, November 22, 1917. American holdings in Germany were of course small in comparison with German holdings in the United States, the proportion being estimated at about 100 to 1 in favor of the United States. The value of American-owned property in Germany was estimated at about fourteen million dollars.

<sup>3</sup> Text in *N. Y. Times*, October 18, 1918.



and copyrights occupied the attention of most of the belligerent governments, though it was less difficult than the problem of dealing with other forms of enemy property, and on the whole the practice was much more in accord with the principles of justice, to say nothing of the liberal and enlightened principles of international law. In several of the belligerent countries the number and value of patents held by enemy subjects were very great. This was notably the case in England and the United States, where patents to many valuable inventions were held by German subjects resident in Germany. Under the English common law it is unlawful for a patentee or licensee or the proprietor of a registered trade-mark or design, who is a person of enemy nationality or domicile, to carry on any trade or business in British territory in respect to such property during the continuance of the war. He cannot, therefore, manufacture or sell in British territory any articles for which he holds a patent or a design or exploit any of the processes in respect to which he has a monopoly. But, obviously, if the exploitation of enemy patents were totally interdicted in a country where the manufacture of many of the most important articles is controlled by enemy patentees, the country might find itself deprived of the use of many articles which are required for the national defence and the maintenance of its economic life.

The British Parliament enacted, shortly after the outbreak of the war, a law empowering the board of trade, in its discretion and on the application of any person, to avoid or suspend wholly or in part, subject to such conditions as it might determine, any patent or license granted to a subject of an enemy State, or the registration of any trade-mark or design to which an enemy subject or any person carrying on business in an enemy State might be entitled. But before issuing such an order, the board of trade was required to satisfy itself that it was in the general interest of the country or section of the community, or of a trade, that such article should not be manufactured or such process carried on or such trade-mark registered. The board was authorized to grant licenses to any British subject for the exploitation of patents held by enemy persons, subject to such conditions as it might see fit. As to trade-marks, however, it could only avoid or suspend registration but not grant licenses.<sup>1</sup> A

<sup>1</sup> Pulling, *Manual of Emergency Legislation*, pp. 226-236.



large number of applications for orders avoiding or suspending enemy patents was granted by the board of trade,<sup>1</sup> and licenses were issued to British subjects to manufacture the articles the patents for which were thus suspended, whenever in the opinion of the board considerations of public policy made it desirable.<sup>2</sup> British licensees in such cases were required to pay the royalties due the enemy patentee to the public trustee, the same to be held by him until the end of the war, when they would be disposed of as the government might determine. Licensees were required to keep accounts, allow the inspection thereof and in some cases to allow the inspection of the business premises. The policy of the British government was, therefore, not to confiscate the rights of enemy subjects in patents or registered designs granted under its authority, but merely to suspend them, and to confer upon British subjects for the time being the right to exploit them whenever the interests of the national defence or the economic life of the country so required, the ultimate rights of the owners being preserved. With a view to preserving the proprietary rights of British subjects in patents issued to them by enemy governments, the board of trade on September 23, 1914, granted a general license for the payment in enemy countries of any fees necessary for obtaining the grant or renewal of patents or for obtaining the registration of designs or trademarks or the renewal of the same in enemy countries. By way of reciprocity the German Chancellor on October 13 issued a proclamation allowing payments to be made in England for a similar purpose by persons domiciled in Germany, and subsequently this privilege was extended to allow payments to be made in France, Russia, and Roumania.<sup>3</sup>

<sup>1</sup> Cf. an article by John Cutter, K. C., in the *Solicitors' Journal and Weekly Reporter* for November 14, 1914, p. 54.

<sup>2</sup> *British Patent Journal*, February 21 and May 9, 1917. With a view to safeguarding British capital invested in the manufacture of articles controlled by German patents, it is said that the British government gave assurances to licensees that they would be allowed to continue to exploit such patents after the close of the war and until their expiration. Cf. an interview by Mr. A. E. Parker, a New York patent attorney, in the *New York Times*, April 14, 1917, and an interview by Mr. Lawrence Langner, *ibid.*, April 13, 1917.

<sup>3</sup> But by a proclamation of December 28, 1916, the permission thus granted to pay fees of this kind in enemy countries was restricted to subjects of Germany or her allies and to neutral persons. A British subject, therefore, domiciled in Germany could not avail himself of this privilege. See Huberich in the *Solicitors' Journal and Weekly Reporter*, Vol. 61, p. 180.

§ 76. **French Policy.** The policy of the French government was similar in principle to that of Great Britain. The matter was not dealt with by legislation, however, until some ten months after the outbreak of the war. By an Act of Parliament of May 27, 1915, the exploitation of patents and the use of trade-marks owned by Germans and Austro-Hungarian subjects, or held in their behalf, were forbidden in the interest of the national defence. There was no intention, however, of revoking or confiscating them. The Act provided that where the manufacture and sale of the patented article were necessary to the national defence or were in the public interest, the government might exploit directly the patent or grant the privilege of exploitation to a French, allied, or neutral *concessionnaire*.<sup>1</sup> Assignments of patents, the granting of licenses, and transfers of trade-marks, properly made before the outbreak of the war to enemy subjects, were to be respected and given full effect, but the beneficiaries were forbidden to make any payments to enemy subjects. No grant of a patent for which application had been made since August 4, 1914, in the case of German subjects, or since August 13 in the case of Austro-Hungarian subjects, could be made unless otherwise ordered. As in other countries, French owners of German patents were allowed to transmit to Germany the necessary sums for the payment of fees for renewal and the like.<sup>2</sup>

§ 77. **German Policy.** By an ordinance of September 10, 1914, the patent office upon application was empowered to grant to the owner of a patent, who by reason of the war was placed in a position of not being able to pay the annual fees, an extension not exceeding nine months, beginning with the date when payable, and without penalties. Furthermore, where it could be shown that by reason of the state of war a person had been prevented from complying in due time with

<sup>1</sup> Text of the law in Reulos, *Manuel des Séquestres*, pp. 23 ff., and 42 Clunet, 258 ff. Cf. also Théry, *Emergency Legislation of France*, London *Solicitors' Journal and Weekly Reporter*, October 23, 1915, pp. 4-5. The texts of the laws and ordinances of France, Germany, England, and Austria-Hungary relating to the treatment of enemy patents may be found in 42 Clunet, 960-978.

The French laws and decrees may also be found in Taillefer and Claro, *Les Brevets, Dessins, Marques et la Propriété Littéraire et Artistique pendant la Guerre* (Paris, 1918), pp. 199 ff.

<sup>2</sup> French policy is explained in detail in the work of Taillefer and Claro referred to in the preceding note.

any regulation prescribed by the patent office, a *restitutio in integrum* might be ordered, provided application was made within two months from the date when the act should have been done. These provisions operated in favor of subjects of a foreign State only if similar concessions were granted to subjects of the German Empire by the foreign State and if such reciprocity had been recognized by notification in the German official gazette.<sup>1</sup> As has been said, the German government by way of reciprocity allowed Germans holding patents in England to make the necessary payments there for the purpose of preserving or renewing their patents.

In October, 1914, the *Reichsgericht* was called upon to decide the question as to the rights of a citizen of France who had applied for a patent in Germany under article 4 of the Paris convention of 1883 for the international protection of industrial property. This convention had been duly approved and ratified by the *Bundesrath* and *Reichstag*, and was held to be a part of the law of the German Empire. The court ruled that until a law had been passed limiting the rights of enemy aliens under the convention, they must be regarded as entitled to the same protection as those of German subjects. War, said the Imperial court, is a contest between States as such and not between peoples; hence enemy subjects must be assimilated to the condition of nationals in respect to their private rights. Therefore they were entitled to the same protection as that which they enjoyed before the outbreak of the war, subject only to such exceptions as might have been made expressly by law. The provisions of the above-mentioned convention could not, therefore, be regarded as having been terminated or suspended by the outbreak of the war between the contracting parties.<sup>2</sup> Even if the convention had been so terminated or suspended, said the Imperial court, it would have had no effect upon vested rights of enemy aliens. The applicant had filed his application before the outbreak of the war and had thereby acquired a vested right under article 4 of the convention. In conclusion the court declared that international conventions dealing exclusively with civil matters are not af-

<sup>1</sup> Huberich, *Art. cit.*

<sup>2</sup> The supreme court of Japan, however, seems to have held that the outbreak of war between Germany and Japan suspended the convention as between those two powers. Text of the decision in 43 *Clunet*, 653.

fectured by war, and unless legislation to the contrary based on reprisal has been enacted, judges must give effect to such conventions.<sup>1</sup>

The British comptroller of patents made a similar ruling in respect to the status of copyrights held in England by German authors.

By an ordinance of July 1, 1915,<sup>2</sup> however, the *Bundesrath* conferred on the Chancellor power to limit or suppress in the public interest the rights of enemy subjects and of persons residing in enemy territory, in respect to patents and trade-marks. But, as in other countries, the exploitation of enemy patents under specified conditions, when it was required by the public interest, could be conferred on German licensees, and in fact such licenses were granted in a good many cases, the royalties due to the owners being paid into the Imperial treasury.<sup>3</sup>

Apparently the only substantial difference between the legislation of Germany and that of the other countries was the authority which seems to have been conferred on the Chancellor by the ordinance mentioned to abolish the rights of enemy patentees. It has been stated, however, that the power thus conferred was exercised only in a limited number of cases.<sup>4</sup>

§ 78. **Legislation in the United States.** The status of patents, trade-marks, and copyrights held in the United States by enemy subjects was defined by the Trading with the Enemy Act of October 6, 1917.<sup>5</sup> This Act allowed enemy subjects to file applications in the United States for patents, trade-marks, and copyrights,<sup>6</sup> and to pay the necessary fees; and in case of

<sup>1</sup> The text of this decision, so highly creditable to the *Reichsgericht*, may be found in Soergel, *Kriegsrechtssprechung und Kriegsrechtslehre*, p. 75; French translation in 43 *Clunet*, 1314 ff. Cf. also Tallefer and Claro, *op. cit.*, p. 3.

<sup>2</sup> French text in 42 *Clunet*, 962 ff., and 43 *ibid.*, 105-106.

<sup>3</sup> Some instances are mentioned in 43 *Clunet* 107.

<sup>4</sup> 44 *Clunet*, 106. As to Austrian legislation, cf. 42 *Clunet*, 968 ff. In August, 1916, the Austrian government, "by way of retaliation" against England and France, decreed that patents and trade-marks held by the nationals of these countries might be restricted or abolished by the Minister of public works, in the public interest. *London Solicitors' Journal*, August 26, 1916, p. 713. According to the press despatches the Russian government went to the length of "appropriating" all patents owned by Germans and relating to "war inventions," and declared all others to be "invalid."

<sup>5</sup> The provisions of the Act applied equally to subjects of governments in alliance with an enemy of the United States.

<sup>6</sup> On April 16, 1918, however, the President issued an order directing that no patents or copyrights should in the future be issued to enemy subjects, and

inability to make the payments or perform other necessary acts on account of the war, they were to be allowed an extension of time up to nine months, provided their governments accorded reciprocity of treatment. With the consent of the President payments of fees might be made in the enemy country by American citizens for the renewal or preservation of their patents, trade-marks, and copyrights in such country. As in the other belligerent countries, provision was made for granting licenses to American citizens for manufacturing or producing, during the duration of the war, articles patents for which were held by enemy subjects, and for using trade-marks, copyrights, etc. The authority to grant licenses was delegated to the President to be exercised by him whenever in his judgment the public welfare required.<sup>1</sup>

A very liberal provision was that which authorized enemy owners at the close of the war to institute proceedings in equity against licensees for the recovery of compensation for the use and enjoyment of their patents, trade-marks, or copyrights, and which authorized the courts to adjudge and decree a reasonable royalty, the amount to be paid out of the fund deposited by the licensee. They were likewise empowered to prosecute suits against other persons than licensees to enjoin infringements of their rights. The law did not specifically declare for the avoidance and suspension during the war of the rights of enemy subjects in respect to patents, trade-marks, or copyrights, but its provisions were clearly based on the assumption that they were suspended. There was no thought, however, of annulling them or impairing their validity.

On the whole, the policy of the United States was more liberal than that of any of the governments mentioned. In view of the large number of valuable patents held in Germany by citizens of the United States, it was to the interest of the United States to deal liberally with the holders of German patents in

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the permission given American citizens to apply for patents in enemy countries was revoked. It was stated in October, 1917, that 200 applications for patents from German subjects were on file in the patent office, but that action on them was being deferred until information was received as to what policy Germany was pursuing.

<sup>1</sup> The President in turn delegated to the federal trade commission the power thus conferred upon him. Cf. the executive order of October 12, 1917, in Supplement to *Amer. Jour. of Int. Law*, January, 1918, p. 51.

America in order to secure reciprocity of treatment by Germany. Favorable treatment of American patentees by the German government was assured by reason of an even larger number of valuable patents issued by the United States to German subjects.

§ 79. **The Status of Copyrights.** Various questions in regard to copyrights held by persons of enemy nationality were raised by the war. Are belligerent governments bound to protect literary works and musical compositions of enemy authors who hold copyrights granted by such governments? Are international copyright conventions terminated by the outbreak of war between the contracting parties, or are they merely suspended, or do they remain unaffected? What was the effect of the war on the international copyright union created by the Berne convention? The various belligerents fall into two classes as far as international copyrights are concerned: (1) those which are members of the international copyright union, that is, those which are parties to the Berne international copyright convention of 1886; (2) those which are not. The majority of the European countries belong to the first class; Russia, the Balkan States, Austria-Hungary, and the United States fall within the second group.<sup>1</sup> The rights of the citizens or subjects of these latter countries are regulated, as far as they are regulated at all, by individual treaties.<sup>2</sup> The Berne convention contains a stipulation to the effect that the convention shall not be abrogated by the outbreak of war between the parties, but that the parties may annul or suspend it as far as they are concerned.<sup>3</sup>

<sup>1</sup> *Le Droit d'Auteur*, June 15, 1917, p. 68. The United States, though not a member of the international copyright union established under the Berne convention, is in the anomalous position of enjoying the privileges of the union in consequence of its having entered into reciprocal copyright conventions with practically all the countries which are members. Cf. Howell, "International Copyright Relations of the United States," *Yale Law Journal*, Vol. 17, pp. 348 ff.

<sup>2</sup> Cf. an article on the general subject in the *Solicitors' Journal and Weekly Reporter* for October 24, 1914, pp. 4 ff. In 1898 the attorney-general of the United States gave an opinion that Spanish subjects were not entitled to the privileges of copyright conferred on Spanish subjects by proclamation prior to the outbreak of the war between Spain and the United States. That is, these rights were suspended by the war. House Docs., 56th Cong., 2d session, 1900-1901, Vol. 99.

<sup>3</sup> The text of the Berne convention may be found in Clunet's *Journal du Droit International*, 1887, pp. 780 ff.; the revised convention of 1908 may be found in *ibid.*, 1911, pp. 685 ff.; cf. also *ibid.*, 1917, p. 791.



In fact, although some of the belligerent governments treated the convention as having been suspended, it does not appear that any of the parties went to the length of treating it as abrogated. In most of the countries enemy copyright holders were accorded the same treatment accorded to enemy patentees, and what was said above in regard to the treatment of the latter applies equally to the former.

In the United States, for example, enemy subjects were allowed to file and prosecute applications for copyrights and pay the fees therefor, and American citizens were authorized to pay to enemy governments the necessary fees to obtain copyrights in such countries, provided a license for this purpose was obtained from the President.<sup>1</sup> But by an order of the President, issued on April 16, 1918, these privileges were revoked, and thereafter no enemy subject could obtain a copyright in the United States, and no citizen of the United States could file an application with an enemy government for a copyright.

The Trading with the Enemy Act<sup>2</sup> also provided that any enemy subject should be allowed to prosecute suits in equity to prevent infringements of copyrights in the United States in the same manner and to the same extent that he would be entitled to do if the United States were not at war. This liberal concession to enemy copyright holders was not accorded, however, by some of the belligerent governments. The German courts, for example, were not open to any enemy person domiciled *outside* the Empire. Nevertheless, under the decision of the Imperial court referred to above, that the Paris convention of 1883 was not affected by the outbreak of the war, the Berne convention, to which Germany was a party, was equally unaffected, and consequently enemy copyright holders in Germany were fully protected.<sup>3</sup>

<sup>1</sup> Trading with the Enemy Act, § 10, pars. *a* and *b*. In August, 1918, it was announced that the alien enemy property custodian would henceforth take over the royalties due on copyrighted enemy operas in the United States.

<sup>2</sup> § 10, par. *g*.

<sup>3</sup> But certain French publishers complained to the bureau of the international union that German publishers in fact were guilty of publishing and offering for sale in Switzerland pirated editions of works upon which French publishers or authors held copyrights in Germany, this in contravention of the terms of the Berne convention. The bureau in reply to these protests promised that energetic steps would be taken to prevent the circulation and sale of such publications in Switzerland. Cf. the correspondence relating to the matter in *Clunet*, 1916, pp. 551-555.



The view, however, that the Berne convention was unaffected by the outbreak of the war does not appear to have been accepted by all the belligerent governments.<sup>1</sup> The question was raised in England by an application from an English publishing house for a license to publish an English translation of Prince von Bülow's *Deutsche Politik*. The comptroller-general of patents ruled that all treaties, such as the Berne convention, between Great Britain and Germany were suspended by the outbreak of the war. That being the case, German authors were entitled to no protection under it against publication of their writings in England. The Trading with the Enemy Amendment Act of 1916 had created a copyright in such publications and had vested it in the public trustee. The ultimate disposition of the right and the royalties due thereunder were to be determined after the conclusion of hostilities. The granting of the license to publish the translation of Prince von Bülow's book was, therefore, recommended by the comptroller, and it was accordingly issued by the public trustee. This action, however, was criticised by many persons in England as being in contravention of the Berne convention.<sup>2</sup>

<sup>1</sup> Article 286 of the treaty of peace with Germany apparently assumed that both the Berne and Paris conventions were suspended during the war, for it expressly provided for their coming into effect again upon the conclusion of peace. Articles 306-310 stipulated that all acts and measures of the allied and associated governments affecting the rights of German nationals in respect to industrial, literary, or artistic property should remain in full force and effect; that no claim should be made by Germany in respect of such acts, and that no action for infringement of the rights of German nationals under either convention should be allowed.

<sup>2</sup> The president of the British association of publishers stated that numerous German works copyrighted in England were offered to British publishers for translation and publication. Those who offered them had in most cases not obtained permission from the German authors or publishers. The association expressed the view that such an appropriation of enemy property rights was contrary to the Berne convention and would throw discredit upon the British nation, which was then struggling for the maintenance of international obligations. The hope was therefore expressed that every British publisher would refuse to publish any book copyrighted in England by a foreign author, unless his consent had been obtained. Clunet, 1916, p. 550. The question was also raised in Germany as to whether a German author might translate and publish without the permission of the author an English book which had appeared during the war. The *Börsenblatt für den deutschen Buchhandel*, the organ of the German publishers, answered the question in the negative. Germany, it said, was bound by the Berne convention; no German publisher, therefore, could by way of reprisal publish an English book without the consent of the author. The war between Germany and Italy, it was true, had terminated the copyright convention between the two countries, but it had no effect on the Berne convention, and the rights of individuals thereunder remained intact. Taillefer and Claro, p. 178.

On the whole, however, there was a commendable disposition on the part of all the belligerent governments to respect the rights of enemy authors and publishers.<sup>1</sup> In some cases the interests of their own citizens required it, and the advantages of a contrary policy would have been more than offset by the loss.

<sup>1</sup> Cf. Howell in the *Yale Law Journal*, Vol. 17, p. 348.

## CHAPTER V

### *TREATMENT OF ENEMY ALIENS (Continued) — RIGHT OF ACCESS TO THE COURTS*

§ 80. English and American Doctrine and Practice; § 81. Article 23(*h*) of the Hague Convention IV of 1907; § 82. English and American Interpretation of Article 23(*h*); § 83. Views of Continental Publicists; § 84. English Interpretation of Article 23(*h*) during the Recent War; § 85. Right to Sue as Plaintiffs Affirmed; § 86. Effect of the Decision; § 87. Writ of *Habeas Corpus* Denied to Interned Enemy Aliens; § 88. Right of a Firm Domiciled in Germany to Sue Denied; § 89. Right of Enemy Aliens to Defend Actions against Them; § 90. Practice of the Prize Court in Respect to Enemy Claimants; § 91. Legislation and Practice in the United States; § 92. Early Opinion and Practice in France; § 93. French Legislation of 1914 and 1915; § 94. Denial of the Right to Sue; § 95. The Right to Sue Defended by High French Authority; § 96. The Right to Sue Defended by Some French Courts; § 97. The German Ordinance of August 7, 1914; § 98. Its Weight and Effect.

§ 80. **English and American Doctrine and Practice.** The question of the right of enemy subjects to sue in the courts of an adversary can hardly be said to be regulated by international law, unless the much-controverted article 23 (*h*) of the Hague convention of 1907 respecting the laws and customs of war on land be interpreted to apply to the actions of the judicial authorities. Certainly it is not true, as is sometimes asserted, that it is a principle of international law that they have no right of access to the courts of the adverse power. Like the practice in respect to trading with the enemy, the matter is determined by the municipal law of each belligerent and is based upon considerations of public policy.<sup>1</sup> The early English common law rule was that an action could not be brought in an English court by or on behalf of an enemy alien except by virtue of a statute, order in council, proclamation, or license from the crown, or unless he came into the country under a flag of truce, or cartel, or in pursuance of some other act of public authority which put him in the King's peace *pro hac vice*. As long ago as 1454 Mr. Justice Ashton said that "an alien enemy who came here under

<sup>1</sup> Cf. Huberich, *Trading with the Enemy*, p. 191; also the Canadian case of *Korzewski v. Harris Construction Co.* (1916), 18 Que. P. R. 97.

the King's license or a safe-conduct could maintain an action for trespass."<sup>1</sup> In the leading early case on the subject, *Wells v. Williams*, decided in 1698 and many times cited by the English courts during the recent war, it was held that, although an enemy alien was in England without a safe-conduct, yet if he continued to reside there by the King's leave and protection and without molesting the government and without being molested by it, he could sue in the King's courts, for the exercise of such a right was a consequence of the protection offered him.<sup>2</sup> This rule was followed by Sir William Scott a hundred years later in the case of the *Hoop*<sup>3</sup> where he said:

"In the law of almost every country the character of alien enemy carries with it a disability to sue or sustain, in the language of the civilians, a *persona standi judicio*. The peculiar law of our own country applies this principle with great rigor. The same principle is received in our courts of the law of nations. They are so far British courts that no man can sue who is an enemy, unless under the particular circumstances that *pro hac vice* discharge him from the character of an enemy, such as the circumstances mentioned above."<sup>4</sup>

The rigor of this ancient rule, which virtually treated enemy aliens as *ex lege*, has recently been criticised as "a relic of barbarous days when the lives and property of all enemies were forfeit to the victor";<sup>5</sup> nevertheless it left open a loophole by which the English courts have in fact been able to open their doors to enemy aliens while at the same time respecting the general principle of the old doctrine. In practice, whenever an

<sup>1</sup> 1 Salk, 45, quoted by the court of appeal in *Porter v. Freudenberg* (1915), 112 L. T. R. 313.

<sup>2</sup> 1 Ld. Raym. 282. The question was raised by Mr. Justice Younger in the case of *Schaffenius v. Goldberg* (1915) as to the authenticity of the phrase quoted above, "without being molested by the government," which does not appear in several reports of the case. The matter was discussed at some length by counsel.

<sup>3</sup> 1 C. Rob. 196, 201 (1799). The case law of England and the United States is reviewed by Huberich in his work on *Trading with the Enemy*, pp. 191 ff.

<sup>4</sup> Mr. Justice Story in his *Notes on the Principles and Procedure of Prize Courts* (p. 21) adopted the same principle.

<sup>5</sup> Such is the opinion expressed by the *London Solicitors' Journal and Weekly Reporter* of January 23, 1915. Cf. also the criticism by Dr. Sieveking, *International Law Association Reports*, 1913, p. 169, who remarks that "there is no earthly reason why a subject of one of the belligerent powers should not be allowed to appear in the courts of the other nation and obtain a judgment, provided execution, unless out of funds in the enemy's country, be stayed until the termination of the war. The idea of his being an alien enemy and therefore having no *persona standi judicio* is too old to be seriously considered."

enemy subject resident in England was able to show that he was there with an express or implied license of the King, he was allowed to appear in the courts either as a plaintiff or a defendant. The onus of showing this was not difficult, for enemy aliens who were allowed to remain in the country after the outbreak of the war were generally assumed to be there by an implied license and therefore under the protection of the crown. This followed as a logical consequence of registration, internment, and other similar measures. It resulted therefore, that under this rule practically the only enemy persons to whom the courts were closed during the late war were those resident in the enemy country or who, though resident in England, were not regarded as being under the protection of the crown.<sup>1</sup>

§ 81. Article 23 (h) of Hague Convention IV of 1907. Until 1907 there was no doubt that belligerents were free to close their courts to enemy subjects, that is to say, the question was one solely of municipal law; but it is not quite clear whether that liberty of action was not surrendered by the adoption of article 23 (h) of the Hague convention of 1907 respecting the laws and customs of war on land. This provision declares that it is especially forbidden "*de déclarer éteints, suspendus ou non-recevables en justice, les droits et actions des nationaux de la partie adverse.*" The prohibition which it establishes was added at the suggestion of two German delegates, Herr Göppert and General von Gründell, the latter of whom in explaining its purpose in the committee said that its object was not limited to protecting corporeal property from confiscation, but that it had in view "the whole domain of obligations, by prohibiting all legislative measures which, in time of war, would place the subject of an enemy State in a position of being unable to enforce the execution of a contract by resort to the courts of the adverse party."<sup>2</sup> It therefore overruled the

<sup>1</sup> Cf. Picciotto, "Alien Enemy Persons, Firms and Corporations in English Law," *Yale Law Journal*, 27: 172 (1917). A classification of the holdings of the English courts in respect to the right of enemy aliens to sue may be found in the brief of the attorney-general in the case of *Re Merton's Patents* (1915), 112 L. T. R. 315. The decisions are grouped under three heads: (1) those upholding the right to sue; (2) those denying the right, and (3) those which deny the right to sue as plaintiffs but uphold the right to sue as defendants.

<sup>2</sup> *Deuxième Conférence Internationale de la Paix, Actes et Documents*, T. III, p. 103.

doctrine of the English and American courts that contracts with alien enemies are generally suspended or terminated by the outbreak of war and that enemy subjects have no right of action in the courts except under the peculiar circumstances mentioned by Sir William Scott and Judge Story referred to above.<sup>1</sup>

§ 82. **English and American Interpretation of Article 23 (h).** English and American authorities have, however, placed a different interpretation on the meaning of article 23 (h), and the matter has been the subject of much controversy. According to their view the purpose of the article in question was merely to prohibit commanding generals and their subordinates in the field from suspending or extinguishing the legal rights of the inhabitants and did not contemplate a restriction on the right of the State through its legislative, executive, or judicial organs to exclude generally enemy subjects from bringing actions in its courts.<sup>2</sup> In favor of this view it is argued that the position of the article clearly shows that it was intended merely as a limitation on the powers of military commanders in the actual theatre of hostilities. It is a part of a chapter entitled "Means of injuring the enemy; sieges and bombardments," which is in turn a subdivision of a general heading entitled "hostilities," all the provisions of which relate to the conduct of operations by military commanders. This view is strengthened by the declaration contained in article 1, that "the high contracting parties will issue to their armed land forces, instructions which shall be in conformity with the 'regulations respecting the laws and customs of war on land' annexed to the present convention." The logical inference, therefore, is that article 23 (h) is one of the "regulations respecting the laws and customs

<sup>1</sup> This interpretation is that adopted by the German government in its official *Weissbuch über die Ergebnisse der im Jahre 1907 im Haag abgehaltenen Friedenskonferenz*, p. 7.

<sup>2</sup> This is the view expressed by General Geo. B. Davis in his *Elements of International Law*, p. 578; cf. also an article by him entitled "Amelioration of the Laws of War on Land," *Amer. Jour. of Int. Law*, Vol. II, p. 70. Cf. also Trotter, *Effect of War on Contracts during War*, Supp. 1915, p. 20, who remarks that the provision in question does not affect the ancient rule of the common law that an alien enemy, unless with special license or authorization of the crown, has no right to sue in the King's courts during war. Cf. also Higgins' *Hague Peace Conferences*, p. 235; Cobbett's *Cases on International Law*, Part II, pp. 85-86; Holland, *Law Quarterly Review*, Vol. 28, p. 94; Huberich, *op. cit.*, p. 45, and Picciotto, *Yale Law Journal*, 27: 170 (1917).

of war on land"<sup>1</sup> and not a general rule of conduct for States in respect to the administration of justice.

The view of the British government regarding the meaning of the clause was expressed by the foreign office in a letter of March 27, 1911, to Professor Oppenheim in response to an inquiry addressed by him to the British secretary of state for foreign affairs. Professor Oppenheim in his letter of inquiry called the attention of Sir Edward Grey to the fact that the interpretation which had been placed upon the clause by continental writers generally and even by some English and American authorities, a number of whom he cited, was in conflict with the old English rule. It was unfortunate, he added, that neither the English blue book relative to the Second Hague Conference,<sup>2</sup> nor the official *procès verbal* of the conference indicated what was the purpose or intent of the provision. In its reply the foreign office, arguing mainly from the position which the article occupies in the text of the convention, rejected the continental interpretation and maintained that the article had no effect on the old English rule regarding the incapacity of enemy aliens to sue.<sup>3</sup>

§ 83. Views of Continental Publicists. Continental writers, however, almost without exception hold the contrary view.

<sup>1</sup> Professor Holland, in commenting on this article (*Law Quarterly Review*, Vol. 28, pp. 94 ff.) remarks that "if this clause is intended only for the guidance of an invading commander it needs careful redrafting; if, as would rather appear, it is of general application, besides being quite out of place where it stands, it is so revolutionary of the doctrine which denies to an enemy any *persona standi in judicio* that although it is included in the ratification of the convention by the United States on March 10, 1908, and the signature of the same on June 29, 1908, by Great Britain, it can hardly, till its policy has been seriously discussed, be treated as rule of international law." In his *Laws of War on Land*, p. 5, Professor Holland cites this paragraph as an instance of the inconvenience of intermixing rules relating to the duties of belligerent governments at home with those intended to serve for the guidance of armies in the field.

<sup>2</sup> *Parliamentary Papers, Misc.*, No. 4, 1907.

<sup>3</sup> Professor Oppenheim's letter and the reply of the British foreign office are printed in French in an article by M. Politis in the *Rev. Gén. de Droit Int. Pub.*, 1911, pp. 250 ff. English text in Oppenheim's, *The League of Nations*, pp. 48-55. Cf. also Trotter, *Effect of War on Contracts during War*, Supp., p. 14, and Spaight, *War Rights on Land*, pp. 140-141. The foreign office in its reply to Professor Oppenheim's inquiry stated that the English rule works automatically at the outbreak of war; "no declaration," it said, "is needed in order to make commercial intercourse with alien enemies illegal and to withdraw from them the protection of the courts. The outbreak of war, *ipso facto*, without any proclamation, abolishes, suspends, and makes inadmissible the rights of the subjects of the hostile party to institute legal proceedings."



Among those who have so expressed themselves, or who apparently assume that the German interpretation referred to above is the correct one, may be mentioned Bonfils,<sup>1</sup> Ullman,<sup>2</sup> Wehberg,<sup>3</sup> De Visscher,<sup>4</sup> Sieveking,<sup>5</sup> Politis,<sup>6</sup> Despagnet,<sup>7</sup> Kohler,<sup>8</sup> Strupp,<sup>9</sup> Noldeke,<sup>10</sup> and Théry.<sup>11</sup> Dr. Sieveking, a German jurist, discussing the force of article 23 (*h*) before the International Law Association at its meeting in 1913, said:

"I think there can be no doubt whatever as to the meaning of this Article: an alien enemy shall henceforth have a *persona in judicio standi* in the courts of the other belligerent for all his claims, whether they originated before or during the war; his claim shall henceforth no longer be dismissed or suspended on account of his being an alien enemy; he shall be entitled to a judgment on the merits of the case, and this judgment shall be immediately enforceable. It has been argued that this article merely conveys instructions to officers commanding in the field and in no way touches the dealings of the home government and the law at home. If this were so it would mean that the German delegates proposed an article devoid of any meaning. An article might just as well have been inserted saying that officers in the field are not allowed to contract alliances or to declare war. Officers commanding in the field have nothing whatever to do with courts of justice, except an officer in command of an occupied district. But the rules as to the rights and duties of the army and the non-combatants in occupied territories and the administration of such territories are laid down in articles 42 to 56 (articles 43 and 48 in particular); and this would be saying the same thing twice over. No, this article was meant as a blow at the rule of the British law, and this intention could not have been more clearly expressed than it has been in article 23 (*h*)."

M. Politis, formerly professor of international law in the University of Paris and now minister of foreign affairs of Greece, in a report made to the Institute of International Law at its

<sup>1</sup> *Manuel de Droit Int. Pub.*, p. 651.

<sup>2</sup> *Völkerrecht*, 2d ed., p. 474.

<sup>3</sup> *Capture in War on Land and Sea*, p. 8; also *Rev. de Droit Int. et de Lég. Comp.*, 1913, p. 197.

<sup>4</sup> *Du caractère ennemi et de la condition des personnes ennemies quant à l'exercice de leurs droits civils*, *Law Quarterly Review*, July, 1915, pp. 289 ff.

<sup>5</sup> *International Law Association Reports*, 1913, pp. 175-178.

<sup>6</sup> *L'Article 23 (h) du Règlement de la Haye*, *Rev. Gén. de Droit Int. Pub.*, Vol. 18 (1914), pp. 249 ff.

<sup>7</sup> *Cours de Droit Int. Pub.*, p. 825.

<sup>8</sup> *Zeitschrift für Völkerrecht*, 1911, p. 384.

<sup>9</sup> *Ibid.*, Vol. 8, pp. 56 ff.

<sup>10</sup> *Deutsche Juristen Zeitung*, April 1, 1917, p. 374, French translation by M. Dreyfus, 44 *Clunet*, pp. 1354 ff.

<sup>11</sup> *Recevabilité des Sujets Ennemis à Ester en Justice en France*, 44 *Clunet*, pp. 480 ff.

session in 1910 likewise expressed the view that the effect of article 23 (h) was to prohibit belligerents from interfering with the execution of contracts made before the outbreak of war and to condemn the old rule in respect to the incapacity of enemy aliens to sue in the courts of the adversary. It forbids, he says, all legislative or other measures tending to invalidate or to prevent the execution of private obligations.<sup>1</sup> In an article published in the *Revue Générale de Droit International Public* in 1911,<sup>2</sup> M. Politis reviewed at length the opinions of the text writers, all of whom, with the exception of General Davis of the United States, he says, adopt the view stated above. The only argument of any weight in favor of the view of the English government is, he adds, that drawn from the position of clause 23 (h) in the text of the convention — “an argument which is not only contrary to the plain language of the provision itself as well as the declaration of Herr Göppert in the committee, but is contrary to the whole spirit of the Hague convention which was to ameliorate the old usages of which the English rule in respect to the judicial incapacity of alien enemies is one of the most rigorous and indefensible.” It is also true, as M. Politis points out, that the official English interpretation has been condemned by a number of the leading English authorities.<sup>3</sup>

§ 84. *English Interpretation of Article 23 (h) during the Recent War.* The English government, however, during the recent war proceeded in accordance with the interpretation adopted by the foreign office in 1911, and the English courts followed this interpretation. The question was first presented to a British court in the case of *Porter v. Freudenberg* in 1915.<sup>4</sup> Adverting to the divergence of views among jurists as to the meaning of the clause Lord Reading said the court was clearly

<sup>1</sup> *Annuaire de l'Institut de Droit International*, T. 23, p. 268.

<sup>2</sup> Vol. 18, pp. 249 ff.

<sup>3</sup> By Phillipson, *Effect of War on Contracts*, p. 46; Higgins, *op. cit.*, p. 263; Lawrence, *Principles*, p. 358 (who says there can be little doubt that it was intended to have a different and far wider application), and Whittuck, *International Documents*, p. xxviii. Holland also apparently takes this view, for he remarks that the clause “seems to require the signatories to legislate for the abolition of an enemy's disability, to sustain a *persona standi in judicio*.” *Laws of War on Land*, p. 5. Some American writers also adopt the continental interpretation, e.g., Bordwell, *Law of War*, p. 210; Gregory, *Am. Jour. of Int. Law*, Vol. II, p. 788, and Hershey, *Essentials of Int. Pub. Law*, p. 395, note 56.

<sup>4</sup> *Law Times*, Vol. 12, p. 313, 1 K. B. 857.

of the opinion that the effect was not to abrogate the old English rule.

"Our view," he said, "is that article 23 (*h*), read with the governing article 1 of the convention, has a very different and a very important effect, and that the paragraph if so understood, is quite properly placed as it is placed in a group of prohibitions relating to the conduct of an army and its commander in the field. It is to be read, in our judgment, as forbidding any declaration by the military commander of a belligerent force in the occupation of the enemy's territory which will prevent the inhabitants of that territory from using their courts of law in order to assert or to protect their civil rights. For example, if the commander-in-chief of the German forces which are at the present moment in military occupation of part of Belgium were to declare that Belgian subjects should not have the right to sue in the courts of Belgium, he would be acting in contravention of the terms of this paragraph of the article. If such a declaration were made, it would be doing that which this paragraph was intended to make particularly forbidden by the solemn contract of all the States which ratified the Hague convention of 1907. According to eminent jurists, the occupying military power is forbidden, as a general rule, to vary or suspend laws affecting property and private personal relations.<sup>1</sup> This article 23 (*h*) has now enacted that, whatever else the occupying military power may order in the territory of the enemy which it domiciles, it shall not henceforth declare that the right of the subjects of the enemy to institute legal proceedings in the courts of that territory is abolished, suspended, or inadmissible. If this be its true force, the enactment as an international compact is not only of high value, but it has been inserted quite naturally and appositively in the position in the section and chapter of the Annex to the convention which it occupies."

Lord Reading then referred to the fact that

"On the eve of the outbreak of the war, the German Ambassador in London addressed a communication to the foreign office to this effect: 'In view of the rule of English law, the German government will suspend the enforcement of any British demands against Germans unless the Imperial government receives within twenty-four hours an undertaking as to the continued enforceability of German demands against Englishmen.' No arrangement," he said, "was arrived at. We refer to these two incidents not because either of them can affect our judgment on the question of the interpretation of article 23 (*h*), but because it is right that it should be made quite clear to everyone that as early as the spring of 1911 the view of the British government as to its true interpretation was made public to the world, and that the situation was perfectly well understood by the German government."<sup>2</sup>

<sup>1</sup> Here he quoted Hall, *International Law*, 6th ed., p. 465.

<sup>2</sup> A South African court adopted the same view of the meaning of the article. *Labuschagne v. Maarbarger*, So. Afr. L. R. (1915), Cape 423.

§ 85. **Right to Sue as Plaintiffs Affirmed.** The decision in *Porter v. Freudenberg*, however, involved only the interpretation of a clause of the Hague convention. It did not affirm that the British courts were in fact closed to enemy aliens under all circumstances. There were at the time three classes of such persons in England: (1) prisoners of war in the strict sense of the term; (2) prisoners of war in a wider sense, including those who were residents or who were temporarily sojourning there at the beginning of the war and who had been imprisoned for one reason or another, and (3) interned civilians. The home secretary stated in the House of Commons on November 26, 1914, that although all three classes were prisoners of war, those of the third class were in a different position from those belonging to the other two classes.<sup>1</sup> They were voluntarily in England by license of the crown and were entitled to the protection of the law even though they were prisoners of war. They belonged to the category of persons referred to in the case of *Wells v. Williams* as being under the protection of the crown and were therefore entitled to bring actions in the courts. On the basis of this distinction the chancery division in October, 1914, ruled that a Hungarian princess residing in England during the war and having properly registered in accordance with the Aliens Restrictions Act was, although an enemy subject, entitled to bring an action for an injunction to restrain the defendant from continuing to publish certain libelous matter against her.

After adverting to the fact that there appeared to be a general impression that enemy aliens were not entitled to any relief at law in the courts of the country, Mr. Justice Sargent stated that the effect of registration was equivalent to a license to remain in the country; in fact it was a command to remain there.

"Inasmuch, therefore, as the plaintiff is coming to insist on a right which is individual to herself, she has, in my opinion, by virtue of her registration and by virtue of the permission thereby granted her to reside in this country a clear right to enforce that right in the courts of this country, notwithstanding the existence of the state of war."<sup>2</sup>

<sup>1</sup> "Interned Alien Enemies," *Law Quarterly Review*, April, 1915, p. 162.

<sup>2</sup> *Princess Thurn and Taxis v. Moffitt*, 1 ch. 58 (1915). The Irish and Scotch courts adopted this view in several cases. Cf. Trotter, *op. cit.*, pp. 122-124. So did the courts of Canada. See especially the case of *Viola v. McKenzie, Mann & Co.* (1915), 24 Quebec B. R. 31; others are cited by Borchard in *Yale Law Journal*, 27: 107, and by Huberich, *op. cit.*, p. 200.

In the above-mentioned case the plaintiff was not an interned prisoner of war. Her position was therefore somewhat different from that of the plaintiff in the case of *Schaffenius v. Goldberg*,<sup>1</sup> where the plaintiff was an interned civilian prisoner who had long resided in England and who had duly registered under the Aliens Restriction Act. In the latter case the question was presented to the chancery division whether the internment as a prisoner of an enemy alien operated to revoke the license to remain in the country — such license being implied by registration under the Aliens Restriction Act — and therefore to deprive him of the protection of the crown. The court held that internment had no such effect, but on the contrary, rather strengthened the license; consequently the plaintiff was entitled to bring an action to enforce a contract entered into between him and a British subject after the internment of the plaintiff.<sup>2</sup> After adverting to the recent decision in the case of the *Duchess of Sutherland*,<sup>3</sup> where it was held that an enemy alien resident in an allied or neutral country could sue in a British court, the court of appeal said it followed, *a fortiori*, that such a person, if resident in England, and especially if interned, could equally maintain an action. "In a case like the present," the court said, "where the plaintiff is effectually prevented from leaving this country, there is no reason of state or public policy why the principle just alluded to should not be given full effect. The case would be quite different if the plaintiff were to remove to enemy territory. He would then become an enemy in the full sense, no longer able for the duration of the war to enforce his civil rights, or sue, or proceed in the civil courts of the realm."<sup>4</sup>

The argument advanced by the defendant that internment was equivalent to the revocation of the license to remain, which was implied by the requirement of registration, Mr. Justice Younger held to be inadmissible. He then referred to the decision in the case of the *Princess Thurn and Taxis v. Moffitt*

<sup>1</sup> 1 K. B. 184 (1916), and *Solicitors' Journal and Weekly Reporter*, Vol. 60, p. 8.

<sup>2</sup> Cf. the case of *Nordman v. Rayner*, 33 T. L. R. 87 (1916), which was also a case of "innocent" internment.

<sup>3</sup> 31 L. T. R. 248.

<sup>4</sup> The case would also probably have been different if it had not been a case of "innocent" internment, that is, if the plaintiff had been interned on account of some overt hostile act. Cf. McNair, "Alien Enemy Litigants," 34 *Law Quarterly Review*, 135.

where it was said that permission to remain really amounted to a command not to depart without special leave, from which it was clear more than ever that internment was merely a further security that the command would be obeyed. In that case the plaintiff was not interned as a prisoner of war, though she was registered. If she was allowed to bring an action, there was no reason for denying the privilege to an interned enemy alien. In short, internment did not alter the position of a registered alien. The danger of allowing an enemy alien to sue would, if anything, be less when he was interned than if left at large.<sup>1</sup>

§ 86. **Effect of the Decision.** The decision in *Schaffenius v. Goldberg* marked a very important relaxation from the rigor of the old rule and was strongly approved by fair-minded persons in England.<sup>2</sup> It was in accord with the most elementary notions of justice and humanity. As long as enemy subjects were allowed to remain in England, it was necessary to allow them legal means of enforcing the payment of debts due them, to say nothing of other contracts. When they were interned in concentration camps and their property and business placed in the hands of custodians and controllers, it would have been a gross hardship to deprive them of the legal remedy of obtaining the necessary means of subsistence. In consequence of the internment of practically the entire enemy alien population the effect of the decision was to open the English courts to the great mass of enemy subjects left in England. The rule thus laid down was followed by the courts in other similar cases.<sup>3</sup> With a few exceptions the only enemy aliens to whom the courts were closed were those residing in enemy territory.<sup>4</sup>

Nevertheless, the right of action thus recognized was con-

<sup>1</sup> Upon appeal the view and reasoning of the divisional court were affirmed by the court of appeal.

<sup>2</sup> Cf., e.g., the *London Solicitors' Journal and Weekly Reporter*, Vol. 59, p. 761. Cf. also the favorable comment by a French writer in 43 *Clunet*, pp. 435 ff.

<sup>3</sup> For example, in the case of *Gow & Co. v. The Bank of Scotland*. Cf. the *Low Times* of October 2, 1915. Other cases are cited in Huberich, p. 209. In the case of *Schaffenius v. Goldberg* the contract in question was entered into after the outbreak of the war. In the case of *Mayer v. Finksibler* it was held that a contract entered into between two parties before the outbreak of the war, one of whom was subsequently interned as an enemy alien, was unaffected, and the latter's right to sue for its enforcement remained. Picciotto, article cited, p. 169.

<sup>4</sup> Persons voluntarily residing in enemy territory, irrespective of their nationality, were not allowed to bring actions in the English courts. Cf. the case of *Scotland v. South African Territories, Ltd.*, *Low Times*, 142: 366 (1917).



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tested by high legal authority. It was asserted, for example, that the case of *Wells v. Williams*, upon which the recent decisions were mainly based, was not strictly an analogous case.

It was also pointed out that the decisions were not in accord with the later cases of *Alciator v. Smith* (1812) and of *Alcinous v. Nigreu* (1854), in both of which enemy aliens were denied the right to sue in British courts. At the outbreak of the wars of 1812 and 1854 there had been no invitation to enemy aliens to remain, as there had been in 1696 upon the outbreak of the war with France. Nevertheless, in the *Alciator* case the plaintiff had been under a régime of registration similar to that of the recent war. But the court held that the fact of registration was not to be regarded as a license.<sup>1</sup>

§ 87. *Writ of Habeas Corpus Denied to Interned Enemy Aliens.* The question whether a writ of *habeas corpus* could issue to an interned German civilian was raised by the case of *Rex v. Supt. of Vine Street Police Station ex parte Liebmann*.<sup>2</sup> The crown contended that, the applicant being a prisoner of war, the writ could not issue. The court held, on the authority of *ex parte Weber*,<sup>3</sup> that he was an enemy alien, and having regard to the fact that spying had become the hall mark of German kultur, a person of German origin who had obtained a discharge from his German nationality but resident in the United Kingdom, and who in the opinion of the executive was a person hostile thereto and was on that account interned, might properly be described as a prisoner and not therefore entitled to the writ.

Inasmuch as practically the entire enemy alien population was interned, the effect of this decision was to deprive all enemy aliens, with a few exceptions, of the benefit of the writ. •

<sup>1</sup> Cf. an editorial in the *Law Magazine and Review* for July, 1915, pp. 215 ff., where the recent decisions that an enemy alien who had not been expelled but was subject to internment or registration was in England by license and therefore entitled to the privilege of suing, is severely criticised. Cf. also Baty and Morgan, *War: Its Conduct and Legal Results*, pp. 254, 269.

<sup>2</sup> 1 K. B. 268 (1916).

<sup>3</sup> 1 K. B. 280 (1916). In this case an application for a writ of *habeas corpus* by a German residing in England, who claimed that he had lost his German nationality by long absence and who was not therefore an enemy alien, was denied on the ground that he had not produced sufficient proof of his loss of nationality. This decision was affirmed by the court of appeal and later by the House of Lords, 1 A. C. 421 (1916).



§ 88. **Right of a Firm Domiciled in Germany to Sue Denied.** In the case of *Re Mehelin Hemcoth, Limited*, a firm composed of three partners, all Germans resident and domiciled in Germany, and having its principal place of business in Germany, but having a branch house in Manchester, the question was raised as to the right of an enemy company to bring an action in a British court to recover for goods sold and delivered to British subjects. The plaintiffs pleaded that since their Manchester business was a branch house they were entitled, under the proclamation of September 9, 1914, to bring the action even though they were enemy subjects. Without deciding whether a license issued to an enemy branch house to trade included the right to sue, the court held that there was nothing in the proclamation which enabled the plaintiffs to recover, where otherwise as alien enemies they could not do so. The proclamation, it was said, did not enable an alien enemy to sue in respect of obligations incurred before the war, and they were not suing in respect of any transactions authorized by the proclamation.<sup>1</sup>

§ 89. **Right of Enemy Aliens to Defend Actions against Them.** Regarding the right of an enemy subject to appear and defend an action brought against him by a British subject, there appears to have been little or no judicial authority before the recent war.<sup>2</sup> The right of an enemy to defend an action had, however, been affirmed by the United States Supreme

<sup>1</sup> *Law Times*, May 8, 1915, p. 25. In the case of *Rodrigues v. Speyer Brothers* (88 L. J. K. B. 1918) a London partnership of six persons, one of whom was a German subject resident in Germany, was allowed to bring an action and recover a judgment. The decision was affirmed by the House of Lords by a vote of three to two. Cf. the comment by Dickinson in 17 *Mich. Law Review*, 598.

<sup>2</sup> Schuster, *Effect of War and Moratorium on Commercial Transactions*, p. 13. In actions against enemy aliens by British subjects for the enforcement of contracts the defence of alienage on the part of the defendant has long been regarded with disfavor by the English courts, even when the suit involved intercourse with the enemy. Lord Kenyon pronounced it an "odious plea" and declared that whoever sets it up must produce the clearest evidence that the defendant is by nationality or domicile an enemy. A case involving this question during the recent war was that of *Schmitz v. van der Veen* (K. B. Div. 112, T. L. R. 99, 1915), where the court overruled the plea of the defendant that being an enemy alien he could not be made the object of a suit at the instance of a British subject. The plaintiff, it was held, was entitled to recover on a contract made before the war, and there was no common law rule which suspended such contracts. So in the case of *Halsey v. Lowenfeld*, the king's bench division held in 1916 that an action might be maintained against an enemy subject for arrears of rent accruing after the outbreak of war. 1 K. B. 143 (1916).

Court in the *McVeigh* case.<sup>1</sup> The question was first raised and disposed of during the recent war in the case of *Robinson & Company v. Continental Insurance Company of Mannheim*, decided in 1915.<sup>2</sup> The pleadings in the suit had been concluded before the outbreak of the war, and after the beginning of hostilities it was contended on behalf of the defendants that under the common law all actions between British subjects and enemy aliens were suspended by the outbreak of war and that consequently an enemy alien could not be heard as a defendant. Mr. Justice Bailhache affirmed, however, that this contention was at variance with the decision of Lord Erskine in *ex parte Boussmaker*,<sup>3</sup> where it was held that an enemy alien could appear in bankruptcy proceedings to protect his right to a dividend. There was abundant authority, he said, for the view that an enemy alien could not appear as a plaintiff if objection was made by the defendant, but it did not follow that the converse was true. There were good reasons, he went on to say, why an enemy alien might be denied the right to appear as a plaintiff to enforce rights which but for the war he would be entitled to enforce for his own advantage and to the detriment of English subjects; but "to hold that a [British] subject's right of suit is suspended against an enemy alien would defeat the object and reason of the suspending rule; in short, the effect would be to convert that which during war is a disability, imposed upon an enemy alien because of his hostile character, into a relief from the discharge of his liabilities to British subjects. To allow an action against an enemy alien and to refuse to allow him to appear and defend himself would be opposed to the fundamental principles of justice."<sup>4</sup>

Justice Bailhache said:

"Once the conclusion is reached that the alien enemy can be sued, it follows that he can appear and be heard in his defense and may take all

<sup>1</sup> 11 Wall, 259.

<sup>2</sup> 1 K. B. 155 (1915).

<sup>3</sup> 13 Ves. 71 (1806).

<sup>4</sup> There is no rule of common law, said the *London Solicitors' Journal and Weekly Reporter* (October 23, 1914, p. 7), which suspends an action in which an alien is a defendant and no rule of common law which prohibits him from appearing and conducting his defence. "Whatever may be the extent of the disability of an alien enemy to sue in the courts of a hostile country," said the *London Times* of October 17, 1914, "it is clear that he is liable to be sued, and this carries with it the right to use all means and appliances of defence."

such steps as may be deemed necessary for the proper presentment of his defense. If he is brought at the suit of a party before a court of justice he must have the right of submitting his answer to the court. To deny him that right would be to deny him justice and would be quite contrary to the basic principles guiding the King's courts in the administration of justice."

Turning then to the question as to whether an enemy alien who is a plaintiff in a lower court might appeal to a higher tribunal, Mr. Justice Bailhache said:

"Equally it seems to result that, when sued, if judgment proceed against him, the appellate courts are as much open to him as to any other defendant. It is true that he is the person who may be said in one sense to initiate the proceedings in the appellate court by giving the notice of appeal, which is the first necessary step to bring the case before the court, but he is entitled to have his case decided according to law, and if the judge in one of the King's courts has erroneously adjudicated upon it, he is entitled to have recourse to another and an appellate court to have the error rectified. Once he is cited to appear he is entitled to the same opportunities of challenging the correctness of the decision of the judge of first instance or other tribunal as any other defendant."<sup>1</sup>

The right of an alien enemy to appear as a defendant was affirmed by the court of appeal in the case of *Porter v. Freudenberg*.<sup>2</sup> This was a case in which a British subject brought an action against a German subject to recover rent due on a lease made in 1903. The defendant resided in Berlin but had a branch house in London. "To allow an alien enemy to sue or proceed during war in the civil courts of the King," said the court, "would be, as we have seen, to give to the enemy the advantage of enforcing his rights by the assistance of the King with whom he is at war. But to allow the alien enemy to be sued or proceeded against during the war is to permit subjects of the King or alien friends to enforce their rights with the assistance of the King against the enemy."<sup>3</sup>

<sup>1</sup> Cf. also the case of *Ingle v. Mannheim Ins. Co.*, 1 K. B. 227 (1915), and the comment in the *Solicitors' Journal and Weekly Reporter*, November 7, 1914. In this case the king's bench division held that the Trading with the Enemy proclamation of October 8, 1914, did not prevent a British subject from receiving money from or suing an enemy alien where the right to be paid or to sue had accrued before the defendant had acquired the status of an enemy alien.

<sup>2</sup> *Times Law Rep.*, Vol. 112, p. 313; 1 K. B. 857 (1915), and *Solicitors' Journal and Weekly Reporter*, January 23, 1915, p. 216.

<sup>3</sup> Schuster (*Effect of War and Moratorium on Commercial Transactions*, p. 3) calls attention to one possible practical difficulty which enemy defendants had to face in England, namely the difficulty of obtaining the services of solicitors

The rule laid down in the above-mentioned cases, that an enemy alien who was sued by a British subject was entitled to appear and defend the action, was, however, the subject of criticism by high English authority on the ground that it was inconsistent with the old doctrine of the suspension and cancellation of contracts, as well as contrary to the reason on which intercourse with the enemy is forbidden.<sup>1</sup> But it appears to be based on good sense and is in harmony with elementary notions of justice.<sup>2</sup>

§ 90. Practice of the Prize Court in Respect to Enemy Claimants. The question as to the right of a non-resident enemy subject to appear as a claimant in prize proceedings and to defend his claim was passed upon by the president of the

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owing to the fact that there was some doubt as to whether an English solicitor might lawfully defend the case of an enemy alien. The suggestion was made during the prize court hearing in the case of the *Möwe* that perhaps solicitors were debarred by the Trading with the Enemy Act from defending enemy aliens. Clause 5 of the Act of 1914 forbade British subjects from entering into any commercial, financial, or other contracts or obligations with an enemy alien. But the *Solicitors' Journal and Weekly Reporter* of November 7, 1914 (p. 35), expressed the view that the prohibition in question was not intended to apply to professional relationships, and therefore the hiring of solicitors was no more illegal than the employment of a physician. "We have by this time," said the editor, "advanced too far to say that an alien enemy is entirely without rights unless that is laid down absolutely, unless, that is, we relapse into the *ex lege* doctrine. Aliens must be entitled to legal assistance and we incline to think that the legal profession would fail of its boasted traditions if it refused assistance." In fact, the difficulty appears not to have been serious, for members of the English bar freely gave advice to enemy aliens.

A more serious practical difficulty in suing an enemy was the problem of serving process on him. The English courts met the difficulty to some extent by allowing substituted service of notices on agents in England or Holland where there was reason to believe that knowledge of the proceedings would be brought to the attention of the principal. Lord Justice Scrutton in 34 *Law Quarterly Review*, 124.

<sup>1</sup> For example, by Baty and Morgan, *War: Its Conduct and Legal Results*, p. 288. Mr. E. G. Roscoe in a letter of October 27, 1914, to the editor of the *Solicitors' Journal and Weekly Reporter* (Vol. 59, p. 23) ventured the opinion that the ruling in this case was inconsistent with the opinion of Sir William Scott in the case of the *Hoop*. "I do not say," he adds, "that the principles laid down by Mr. Justice Bailhache are not eminently desirable, but are they actually in accordance with the principles of English law as hitherto laid down?" To this communication the editor replied that Sir William Scott was dealing with the right of an enemy alien to sue as a plaintiff and not as a defendant, and therefore his remarks regarding the incapacity to sue could not be interpreted as denying the right of defence (*ibid.*, October 31, 1914, p. 20).

<sup>2</sup> Cf. the views of Picciotto, article cited, p. 173, and of Lord Justice Scrutton, "The War and the Law," 34 *Law Quarterly Review*, 123.

British prize court in the case of the *Möwe*, decided on November 9, 1914.<sup>1</sup> Sir Samuel Evans held that although no legal right to appear and defend existed, he would, in the exercise of the power which belonged to the court to adopt rules of practice, allow enemy claimants to appear and defend any right claimed under the Hague convention respecting the treatment of enemy merchant vessels found in port at the outbreak of the war. Counsel for the claimants argued that they were not plaintiffs claiming the restitution of the ship, but defendants seeking to avoid condemnation, and they cited numerous authorities, English and American, in support of the right of an enemy subject to appear in court as a defendant.

Sir Samuel Evans reviewed at length the practice and jurisprudence during the Crimean, Spanish-American, and Russo-Japanese wars, in all of which enemy claimants were allowed to appear in prize proceedings, but only because there were special circumstances which *pro hac vice* suspended their enemy character for the purpose of suing. In the present case, however, there was no coming *pro hac vice* within the King's peace, nor suspension of the hostile character, and he was satisfied that neither Lord Stowell nor Dr. Lushington would have allowed an enemy owner to appear to assert a claim in a case similar to this.

Nevertheless, permission to an enemy to sue was not a matter of international law but of court practice, and he thought the prize court had the inherent power to regulate its own practice unless prohibited by law. Lord Stowell did so from time to time, and his right was not questioned.

"A merchant," said Sir Samuel, "who is a citizen of an enemy country would not unnaturally expect that when the State to which he belongs, and other States with which it may unhappily be at war, have bound themselves by formal and solemn conventions dealing with a state of war, like those formulated at the Hague in 1907, he should have the benefit of the provisions of such international compacts. He might also naturally expect that he would be heard, in cases where his property or interests were affected, as to the effect and results of such compacts upon his individual position."

In view of these considerations and in order "to induce and justify a conviction of fairness, as well as to promote just and

<sup>1</sup> Trehern, *British and Colonial Prize Cases*, Vol. I, pp. 60 ff. The question had already been raised in the cases of the *Chili* and the *Marie Glaeser*, but a ruling on the merits of the question was not necessary to the judgment.

right decisions," Sir Samuel announced that he would direct that whenever an enemy subject conceived that he was entitled to any protection, privilege, or relief under any of the Hague conventions of 1907, he would be allowed to appear as a claimant and argue his claim before the court.<sup>1</sup>

It will be seen that the doctrine here laid down by the British prize courts is theoretically in accord with the old rule, for it denies the legal right of an enemy subject to appear and defend his claim to property in the custody of the prize court. The concession here granted was in fact limited to those only who claimed rights under the Hague conventions, and it was accorded only as an act of grace on the part of the court and might be denied at any time in the discretion of the judge. The decision therefore did not go to the length to which the king's bench division and the court of appeal went in the cases referred to above. It is submitted that the prize court might have gone further, overruled the ancient doctrine and laid down the broad principle that enemy subjects have a right to be heard not only when they assert claims under the Hague conventions, but also for any other reason.<sup>2</sup>

§ 91. **Legislation and Practice in the United States.** Section 7, paragraph *b*, of the Trading with the Enemy Act of October 6, 1917, declared that nothing in the said Act should be deemed to authorize the prosecution of any suit or action at law or in equity in any court "within the United States" by an enemy or an ally of an enemy prior to the end of the war, provided that such person, if licensed to do business under the Act, might prosecute any suit arising solely out of such business transacted in the United States, and any enemy or ally of an enemy might defend by counsel any suit or action brought against him. Several cases involving the right of Germans to sue in the state courts arose in 1917 and 1918. In the case of *Posselt v. D'Espard*<sup>3</sup> a court of chancery in New Jersey declined to stay a suit brought by a person erroneously assumed to be a German subject, resident in the United States, and the manager of a corporation, a majority of the stock of which was owned by a German

<sup>1</sup> The British prize court in Egypt adopted the same rule in the case of the *Gulensfels* (Treher's Cases, I, 102).

<sup>2</sup> It is refreshing to find the *London Solicitors' Journal and Weekly Reporter* advocating this view. Cf. its issue of November 14, 1914.

<sup>3</sup> 100 *Atlantic Reporter*, 893 (1917).



corporation, for the preservation of the rights of the complainants as stockholders in a New Jersey corporation.<sup>1</sup>

The New York supreme court declined to follow the decision of the English House of Lords in the *Continental Tyre & Rubber* case and held that a New Jersey corporation, a large majority of the shares of which were owned by a German corporation and a German subject resident in Germany, was an entity separate and distinct from its stockholders and was therefore entitled to maintain an action. After reviewing the American cases at length, the court reached the conclusion that the decisions were practically unanimous in regarding a corporation as a thing apart from its corporators and that the rule laid down by the House of Lords was not in accord with American precedents. Therefore, a corporation, created under the laws of any one of the States, could not be deprived of access to the courts for the protection of its legal rights, notwithstanding the fact that a large majority of the individual stockholders were enemy subjects resident in enemy territory.<sup>2</sup>

In a suit brought by German subjects resident in Germany to recover money due them by an American firm, before the declaration of war, however, a United States district court directed the proceedings to be suspended rather than dismissed, until the restoration of peace.<sup>3</sup>

A motion to dismiss a complaint filed by a resident enemy or to stay proceedings was denied by the supreme court of New York. There was nothing in the Trading with the Enemy Act, said the court, which was applicable to the case, and there was

<sup>1</sup> The court said, *inter alia*: "The solution of the problem now before me, I think, is found in the President's message to Congress, which in view of the nature of its reception by Congress and the action of Congress under it has become the voice of the country; and the President's proclamation declaring a state of war and defining rights of residents, an official act under authority of Congress. German residents who comply with needful regulations and who properly conduct themselves are assured that they will be undisturbed in the peaceful pursuit of their lives and occupations and be accorded the consideration due all peaceful and law-abiding persons, except so far as restrictions may be necessary for their own protection and for the safety of the United States. To shut the door of the court in the face of an alien enemy resident here would be a distinct violation of not only the spirit but the letter of this proclamation."

<sup>2</sup> *Fritz Schultz, Jr. v. Raimes & Co.* (1917) 166 N. Y. Supp. 567. The leading Federal case upon which the court relied was *Bank of U. S. v. Deveaux*, 5 Cranch U. S. 61.

<sup>3</sup> *Plettenberg, Holthaus & Company v. Kalmon & Company*, 241 Fed. Rep. 605.



no evidence that it was the intention of Congress or the President to deny to the plaintiff the exercise of the same civil rights enjoyed by friendly aliens. The court added:

"With only a few exceptions the nations of all the earth both advocate and practice many ameliorations of the acerbities of war. In that endeavor this nation is not backward. No limitation is placed upon the freedom of resident subjects of a foreign State with which we are at war, unless that limitation is deemed necessary to withhold from that enemy the aid or comfort which may advance his cause. Mere technical or arbitrary rules are neither enacted, nor, when found in ancient usage, enforced. How could our own plans be served or those of Germany defeated or impaired by closing against the plaintiff the doors of our courts? While I should be inclined to hold that the plaintiff is entitled to maintain her action on the ground that within the purview of the Trading with the Enemy Act she is not an alien enemy engaged in trade subject to suspension by the Federal Government, I prefer to deny the motion on the broad ground that the resident subjects of an enemy nation are entitled to invoke the process of our courts so long as they are guilty of no act inconsistent with the temporary allegiance which they hold for this Government."<sup>1</sup>

#### FRENCH LAW AND PRACTICE

§ 92. **Early Opinion and Practice in France.** As to the right of enemy subjects to sue either as plaintiffs or defendants in the courts of France there appears to have been little judicial authority or positive legislation prior to the recent war. There was, however, a decision of the *parlement* of Douai in 1704 to the effect that a subject of an enemy power could not sue a subject of the King of France, when the latter had by decrees prohibited all relations between his subjects and those of the enemy country. There also appears to have been an "act of government" in 1803 and a decision of the court of cassation in 1806 affirming this principle.<sup>2</sup>

<sup>1</sup> *Arndt-Ober v. Metropolitan Opera Co.*, 58 N. Y. Law Jour. 1347 (1918). Cf. also the case of *Speidel v. N. Barstow Co.*, 243 N. Y., 621 (1917), and *Schanake v. Acme Mfg. Co.* (1918) N. C. 95, L. E. 851.

As to the American case law on the subject cf. an article entitled "Alien Enemies as Litigants," published in *Case and Comment* for June, 1917, pp. 93 ff. This article appears to contain an exhaustive examination of the cases decided by the American courts. See also Borchard, "Right of Alien Enemies to Sue," *Yale Law Journal*, 27: 105; Huberich, *On Trading with the Enemy*, pp. 188 ff. and 194 ff., and Mitchell in the *Maine Law Review*, November, 1917.

<sup>2</sup> On the French practice and doctrine cf. two valuable articles by Professor Jules Valery, of Montpellier, in 23 *Rev. Gén. de Droit Int. Pub.*, 1916, pp. 379 ff., and in 42 *Clunet*, 1915, pp. 1009 ff.

§ 93. French Legislation of 1914 and 1915. During the recent war no legislation expressly denying the right to sue was enacted by the French parliament or proclaimed by decree of the government, but those who adopted the view that the right to sue did not exist, either relied upon the legislation and jurisprudence of the first Empire, referred to above, which they say has never been repealed, or upon the terms of the decree of September 27, 1914, prohibiting commercial relations with the enemy. Article 2 of this decree declared null and void, as being contrary to public policy (*l'ordre public*), every act or contract performed or entered into, either in French territory or in a French protectorate, with subjects of the German or Austro-Hungarian Empires or with persons residing therein. Article 3 prohibited and declared to be null, as contrary to public policy, the execution for the benefit of the subjects of the said Empires or persons residing therein, of pecuniary or other obligations resulting from every act or contract done or entered into in French territory by every person prior to August 4 in the case of German subjects and prior to August 13 in case of Austro-Hungarian subjects. By a decree of November 7, 1915, the terms of the decree of September 27 were extended to apply to relations with the subjects of Bulgaria and persons residing therein.

§ 94. Denial of the Right to Sue. The above-mentioned prohibition in respect to contracts with enemy subjects, it was argued by the adversaries of the right to sue, applied not only to relations of a pecuniary or commercial character but also to civil contracts and relations such as are necessarily implied in judicial proceedings between Frenchmen and enemy subjects. It followed, therefore, that enemy subjects were prohibited from instituting or prosecuting actions in the courts of France. This was the view adopted by a number of French jurists<sup>1</sup> and by

<sup>1</sup> For example by Professor Valéry in the articles cited above; by M. Reulos, *Manuel des Séquestres*, p. 12, n. 1, and p. 214; by M. Courtois in *Clunet's Journal*, T. 42, p. 509; by M. Troimaux, *Séquestres et Séquestrés*, pp. 163 ff., and by M. Théry in *Clunet*, T. 44, pp. 480 ff. Professor Valéry affirms that the judicial disability of enemy aliens was a rule of the Roman law and is equally the established doctrine of French public law. Rousseau's theory that war is a contest merely between armed forces may, he says, have been true before 1914; but the refusal of the Germans to act in harmony with it destroyed whatever force it had acquired. He quotes Portalis and Leuder (*Holtzendorff's Handbuch*, IV, p. 358) in support of the view which he maintains. Valéry, however, appears to have admitted that an enemy subject might defend an action against him.

the French courts in several cases.<sup>1</sup> One of the most reactionary decisions in which the right to sue was denied was that of May 18, 1916, by President Monier of the tribunal of the Seine (*référé*)<sup>2</sup> who interpreted the prohibition in the decree of September 27 in respect to *actes* and *contrats* with enemy subjects to embrace "judicial" acts such as are involved in retaining counsel and bringing actions in the courts.

Adverting to the contention that under article 23 (*h*) of the fourth Hague convention of 1907 enemy subjects are entitled to sue in the courts of France, M. Monier asserted that "an international convention cannot prevail against a subsequently enacted municipal law which modifies its provisions and respect for which is rigorously imposed on every inhabitant of French territory,"<sup>3</sup> the "speculative theories of the law of nations" to the contrary notwithstanding. Furthermore, the above-mentioned provision of the Hague convention was not binding on France, because it had been violated by the German decree of August 7, 1914, which excluded French subjects from suing in the courts of Germany.<sup>4</sup> Not only this, but, M. Monier added, the Germans had "cynically and deliberately violated all the rules imposed on belligerents by the various conventions of the Hague"; consequently the subjects of Germany were not entitled to the benefit of the law of nations in general nor of the Hague conventions in particular.<sup>5</sup> Every reason and

<sup>1</sup> Among the French courts which refused to admit enemy aliens to sue were the civil tribunal of Marseilles (June 22, 1915); the tribunal of commerce of Marseilles (January 5, 1917); of Philippeville (April 15, 1915), and the tribunal of the Seine (*référé*), May 18, 1916. Nevertheless, sequestrators of enemy property could sue for the purpose of protecting the property in their custody. Actions by French creditors for the recovery of debts against sequestrated property could also be brought against the sequestrator, in which case the latter could defend the action.

<sup>2</sup> The case of *Wilmoth, Sequestrator v. Daude*, text in Phily, *Jurisprudence Spéciale et Législation de la Guerre*, Pt. III, pp. 225 ff., also in Clunet, T. 43, pp. 1303 ff.; cf. also the case of *Wilmoth, Sequestrator v. Société Gén. Immobilière*, December 21, 1915. Text in Reulos, pp. 355 ff.

<sup>3</sup> Professor Barthélemy (43 Clunet, p. 1484) remarks that this doctrine is "calculated to move the hearts of international publicists." M. Barthélemy properly adds that international conventions which have been ratified by France are binding upon all French judges.

<sup>4</sup> But as M. Barthélemy remarks, the German prohibition applied only to French citizens domiciled *outside* the Empire and not at all to those resident therein. See also 42 Clunet, p. 567, and 43 Clunet, p. 1131, on this point.

<sup>5</sup> Cf. on this point the more liberal views of Judge Cater, of the British prize court at Alexandria, in the case of the *Gutenfels*, quoted above.

consideration of law and fact, he concluded, was opposed to opening the courts to Germans; such liberty was in flagrant contradiction with the tendencies of opinion; it would lead in practice to serious inconveniences, possible collusions, and fraud and even irreparable injury to the country.

That enemy aliens had no *persona standi in judicio* was also the view of the council of the order of advocates of the court of Paris,<sup>1</sup> and of the chamber of solicitors (*avoués*) of the tribunal of the Seine.<sup>2</sup>

§ 95. **The Right to Sue Defended by High French Authority.** The decision of the tribunal of the Seine and the doctrine of Valery, Courtois, and others that enemy subjects have no

<sup>1</sup> Resolution adopted November 30, 1915; text in 43 Clunet, pp. 12 ff.

<sup>2</sup> Reulos, p. 215. One of the arguments advanced in support of the view that enemy aliens have no capacity to bring actions in the courts was that the employment of an attorney would involve the entering into contractual relations between the attorney and the enemy client, which was in effect forbidden by the decree of September 27. Cf. Courtois and Valery in 42 Clunet, pp. 511 and 1009. The resolution of the council of the order of advocates referred to above declared that inasmuch as Germany had prohibited "all relations" with enemy subjects, it was the duty of the French bar to set an example of patriotism by refusing to take the cases of German suitors. No advocate of the court of Paris, it was said, could advise or defend a subject of an enemy power, unless he had been authorized by the *bâtonnier* to do so, and this was the view of the tribunals of the Seine and of Marseilles in the cases referred to above. The contention that taking the case of an enemy client was a "contract" forbidden by the decree of September 27 was, however, vigorously attacked by Professor Barthélemy (*L'Accès des Sujets Ennemis aux Tribunaux Français*, 43 Clunet, p. 1487) and by M. Clunet (*Concours Professionnel des Avocats aux Sujets Ennemis et le Barreau de Paris*, 43 Clunet, pp. 14-18). Such an interpretation, says Barthélemy, is "purely literary, pharisaic, judaic, contrary to the intention of the legislature and in effect leads to the infliction of a sort of civil death upon enemy subjects by depriving them of their judicial personality." M. Clunet adds that enemy subjects have a right under international law and the municipal law of France to retain the services of members of the bar. He cites a number of cases in which the courts had upheld the right of enemy subjects to employ counsel, and the right was affirmed by the fourth chamber of the court of appeal of Paris on April 20, 1916. The court of cassation (November 19, 1914) appears also to have admitted the right. President Monier of the tribunal of the Seine, in the case referred to above, however, took occasion to say that "it was to the honor of the Paris solicitors that no one had claimed the right to defend a German" (43 Clunet, p. 1308). This tribunal, as well as those of Marseilles (44 Clunet, p. 241) and Besançon (*ibid.*, p. 248), held that the decree of September 27 prohibited all *juridical* as well as *commercial* relations with enemy subjects and that the latter could not therefore retain an attorney. A German writer, Dr. Haber, in the *Juristische Wochenschrift* of April 15, 1916 (Fr. trans. in 44 Clunet, pp. 448 ff.), contrasting the German and French practice, remarks that if the decree of September 27 prohibited a German from hiring a French lawyer, it prohibited him from buying food or clothes from a Frenchman.

standing in the courts was vigorously attacked by a number of French jurists, among whom were Renault, Weiss, Clunet, and Barthélemy. Professor Barthélemy in an able discussion of the question<sup>1</sup> asserts that the old doctrine enunciated by the *parlement* of Douai in 1704 is not in accord with modern French law or practice. Modern French law, on the contrary, he says, is in favor of the right of enemy subjects to sue in the courts of France, and in fact this right was recognized throughout the nineteenth century.<sup>2</sup>

The modern theory, he argues, is that war is a contest between the armed forces of States and not a struggle between peoples. Non-combatant subjects of the contesting powers are not at war with one another, and, he adds, it is the duty of the French courts "to preserve in the midst of the present storm the small flame which still burns at the end of the taper of international law."<sup>3</sup> No argument, he says, can be drawn today from the principle of the civil code, which was hostile to the rights of foreigners; its doctrine is out of date, the principle of modern law being that enemy subjects must be treated as ordinary aliens are treated, subject to the precautions necessary to protect the State against injury. The State may prohibit its own nationals from entering into new juridical relations with enemy subjects, and it may modify old rules whenever those relations would have the effect of increasing the resources or strength of the enemy; but to close the courts to enemy subjects and deny them the protection of the law is not justified by considerations of national defence. The purpose of judicial actions is merely to determine juridical situations; if the result of a suit in a particular case is a judgment in favor of an enemy subject and if the payment of the sum recovered would be prejudicial to the national interests, the government has only to suspend the execution of the judgment and thus protect the country against possible injury.<sup>4</sup> That is permissible; but there is no sound

<sup>1</sup> *L'Accès des Sujets Ennemis aux Tribunaux Français* in Clunet's *Journal*, T. 43, pp. 1473-1504.

<sup>2</sup> In support of this statement M. Barthélemy cites Merlin, *Répertoire*, s. v. *Guerre*; Massé, *Le Droit Commercial*, Vol. I, p. 128, and Nys, *Le Droit Int.*, Vol. III, p. 69.

<sup>3</sup> *Ibid.*, p. 1480.

<sup>4</sup> M. Reulos (*Manuel des Séquestres*, p. 216) remarks, however, that the theory that an enemy alien shall be permitted to maintain an action in the court, but in case he obtains a favorable judgment its execution may be suspended, rests on a

reason for refusing to an enemy subject the privilege of having his legal rights adjudicated and determined by the courts. The power of the courts, he adds, to suspend or extinguish the legal rights of enemy subjects was forbidden by clause 23 (*h*) of the fourth Hague convention of 1907 to which France was a party; and while Germany had not strictly conformed her conduct to its provisions, she had not, as many Frenchmen seem to have assumed, closed her courts to French nationals residing in the German Empire, but only to those domiciled *outside* German territory, and even these were allowed to sue with the permission of the Chancellor. Moreover, the German courts were open for actions arising in connection with enemy branch houses and establishments when the principal establishments were situated in Germany.

Finally, he pointed out that English practice was less rigorous than that followed by some of the French courts, for in England interned enemy subjects — and this included practically the whole enemy population — were allowed access to the courts both as plaintiffs and defendants.<sup>1</sup>

This liberal and enlightened view, highly creditable to the distinguished jurist who enunciated it, was adopted by M. Edouard Clunet, the learned editor of the *Journal du Droit International*.<sup>2</sup> M. Clunet, like M. Barthélemy, attacked the old doctrine laid down by the *parlement* of Douai as being contrary to the fundamental theory of modern law. He admitted that the right of enemy subjects to sue might be abrogated by statute, yet it had never been done by France during any of the wars of the nineteenth century to which she was a party,<sup>3</sup> and it was not the intention of the decree of September 27, 1914, to do so. Like M. Barthélemy he held that the right to sue was guaranteed by clause 23 (*h*) of the fourth Hague

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subtle distinction and that in practice the right would be of no value to the enemy litigant.

<sup>1</sup> The French courts, however, which sometimes closed their doors to German subjects, showed more consideration for enemy aliens of other races. Thus a Bulgarian who had a *permis de séjour* was allowed to bring an action (Trib. of Seine, March 13, 1917, 44 Clunet, p. 1481), and so was an Alsatian of French origin who was provided with a tricolor card (*ibid.*, T. 44, p. 1071).

<sup>2</sup> See his article entitled *Les Sujets Ennemis devant les Tribunaux Français*, 43 Clunet, pp. 1089-1094.

<sup>3</sup> As authority on this point he quoted Massé, *Le Droit Commercial*, Vol. I, p. 128.



convention of 1907, and without answering the question which he himself raised as to whether the French legislature could modify the rule embodied in the convention, he was firmly of the opinion that it had not in fact done so. Finally, he pointed out that no danger to the national interests would result from the opening of the courts to alien enemies, because the government was still free to suspend the execution of any judgment or the enforcement of any decision the execution or enforcement of which would be detrimental or dangerous to the country.<sup>1</sup>

§ 96. **The Right to Sue Affirmed by Some French Courts.** In a number of cases — in fact in the majority of those in which the question was raised — the French courts upheld the right of enemy subjects to sue both as plaintiffs and defendants.<sup>2</sup> The council of prizes also allowed enemy claimants to appear and defend their claims to ships and goods which were the object of prize proceedings. These decisions, so favorable to the rights of enemy aliens, however, provoked considerable criticism in France and the question was taken to the court of appeal of Paris, the 4th Chamber of which on April 20, 1916, rendered a notable decision upholding the right of enemy aliens to sue in the courts of France.<sup>3</sup> "This right," said the court of appeal,

<sup>1</sup> For a German criticism of the French doctrine and practice cf. an article by Dr. Karl Hirschland in the *Juristische Wochenschrift*, September 15, 1916, French text in 44 *Clunet*, pp. 87 ff. Cf. also an article by Dr. Haber, of Leipzig, in the same periodical, April 15, 1916 (French trans. in 44 *Clunet*, pp. 448 ff.).

<sup>2</sup> See especially the decision of the 10th Chamber of the tribunal of the Seine in the case of *Gieb Cie. Gén. des Voitures*, January 9, 1915 (42 *Clunet*, pp. 62 ff. and 509 ff.); the decision of the same tribunal in the case of *Doyen Orenstein and Kuppel* (43 *Clunet*, p. 974); and the decision of the court of appeal of Rouen, May 17, 1915 (*ibid.*, p. 1095); of the tribunal of Alger, July 22, 1915 (*ibid.*, p. 903); of the tribunal of Epinal, August 27, 1915 (*ibid.*, p. 262); of the tribunal of Nice, April 20, 1916 (*ibid.*, p. 1311); and the court of appeal of Aix, October 6, 1916 (44 *Clunet*, p. 717). The court of appeal of Alger in the important case of the *Vulcan Coal Company*, decided on July 22, 1915, declared that "according to a principle of the law of nations, belligerent States alone are enemies, not the citizens thereof; consequently, the nationals of each such State have free access to the courts of the enemy country." (Text in 42 *Clunet*, pp. 903 ff.)

As to decisions affirming the right to sue, see the article of M. Clunet, *Les Sujets Ennemis, etc.*, 43 *Clunet*, pp. 1089 ff., and the article of Barthélemy, cited above, 43 *Clunet*, pp. 147 ff.

<sup>3</sup> *Compagnie Bulgaria v. Olivier*, text in Phily, *Jurisprudence Spéciale*, Pt. III, pp. 749 ff.; 43 *Clunet*, pp. 380 ff., and Troimaux, pp. 186 ff. See also 43 *Clunet*, p. 1001. A history of this interesting case may be found in Troimaux, pp. 163 ff. The case involved the right of an enemy insurance company to appeal from the decision of a tribunal to the *Cour d'Appel*. The *Avocat Général*, M.



"must be considered to be one of the natural rights which foreigners enjoy in France, so long as there is no express provision to the contrary in the municipal law or international conventions." It was a right that had been secured to enemy aliens by article 23 (*h*) of the Fourth Hague convention and it had not been abrogated by any law or decree of the French government.

The decree of September 27, 1914, as every exceptional law which introduces new principles, must, said the court, be strictly interpreted, and in the light of existing laws and general principles. It was, as clearly appeared from the report on which it was based, designed to prohibit only *commercial* relations with the enemy and was not intended to interdict civil agreements or acts. This decision was undoubtedly in harmony with the spirit of modern law and liberal practice and it was strongly approved by jurists like Renault, Weiss, Barthélemy and Clunet.<sup>1</sup> It was, however, the object of much criticism in and out of parliament<sup>2</sup> and a bill was promptly introduced in the Chamber of Deputies, the purpose of which was to overrule the decision. The bill passed the Chamber but it appears never to have received the approval of the Senate. The right of enemy subjects to sue therefore remained to be determined by the courts in each particular case as it arose. Some followed one rule, some another. The court of cassation does not appear to have passed on the question. It was unfortunate that the matter was never definitely settled by an Act of Parliament in the interest of certainty and uniformity of practice. It was a question of public policy which should have been dealt with

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Godefroy, made a strong argument in favor of the right of enemy aliens to plead in the French courts, on grounds of justice and French precedents. There could be no danger, he contended, in allowing enemy subjects to exercise this right, for if they obtained a judgment the execution of which would in any way prejudice the national defence, the government had the right to suspend execution.

<sup>1</sup> Clunet remarks that it was "irreproachable." The court of appeal of Aix rendered a similar decision. 44 Clunet, 717.

<sup>2</sup> See, for example, the criticism of Troimaux, *op. cit.*, pp. 171 ff., who pronounced it "detestable," contrary to French precedent and doctrine, in violation of the decree of September 27, and unjustified in view of German practice in respect to the right of French nationals to sue in German courts. See also Théry, *Recevabilité des Sujets Ennemis à Ester en Justice en France* (44 Clunet, pp. 480 ff.), who ridicules the proposition that the privilege of access to the courts is a "natural right."

by legislation and not left to the discretion of the courts with their conflicting opinions.<sup>1</sup>

#### GERMAN PRACTICE

§ 97. The German Ordinance of August 7, 1914. By an ordinance of the *Bundesrath* of August 7, 1914, issued in pursuance of authority granted by an act of the German parliament of August 4, the right of all persons who had their domicile (*Wohnsitz*) abroad<sup>2</sup> and of all corporations (*juristische Personen*) which had their seat in foreign countries to maintain actions in the German courts for the recovery of either debts or patrimonial claims (*vermögensrechtliche Ansprüche*) occurring before July 31, 1914, was suspended until October 31, 1914. Actions instituted prior to the taking effect of the ordinance were likewise suspended until the latter date. The Cancellor was, however, authorized to make exceptions in individual cases to the rule thus laid down, but it is not probable that any exemptions were ever granted to enemy aliens. He was also authorized to extend the application of the provisions of the ordinance to branch establishments of enemy nationality without regard to their domicile or situs.<sup>3</sup> The duration of the decree appears to have been extended from time to time, so that whereas it was ostensibly intended at first to be only a temporary measure, it was in fact made permanent.

<sup>1</sup> The Italian government by decree closed its courts to Austro-Hungarian and Ottoman subjects, but in consequence of the treaty of May 21, 1915, with Germany, German subjects were permitted to sue in the Italian courts on condition of reciprocity of treatment by Germany. See two articles by Pellizzi entitled *Condition des Sujets Ennemis en Italie*, 45 *Clunet*, 539 ff. and 1082 ff.; also an article by Breschi in the *Rivista de diritto internazionale*, 1917, pp. 244 ff. See also 46 *Clunet*, pp. 80, 421, and 656.

<sup>2</sup> Presumably without distinction as to whether they were domiciled in neutral or enemy territory. But by an ordinance of June 25, 1915, persons domiciled in Switzerland, if not enemy subjects, were allowed to sue in the German courts. 43 *Clunet*, p. 1166.

<sup>3</sup> Text of the ordinance in *Die Kriegsnotgesetze für das Reich und Preussen*, Bd. I, S. 64; French translation of the text in Reulos, *Manuel des Séquestres*, p. 478. See also an analysis in the *London Solicitors' Journal and Weekly Reporter* of November 7, 1914.

By a German ordinance of December 2, 1916, enemy subjects, companies, and associations domiciled in enemy country were prohibited from bringing suits in Belgian courts for the enforcement of pecuniary claims. *Int. Law Notes*, January, 1917, p. 15.

§ 98. **Its Weight and Effect.** It will be seen from an examination of the ordinance that the test of enemy character, so far as judicial capacity was concerned, was domicile rather than nationality. Under the terms of the ordinance enemy subjects domiciled or resident in the Empire were free to maintain actions in the German courts without restriction, both as plaintiffs and defendants and apparently without regard to whether the litigant was interned in a concentration camp or not. The same liberty was accorded to the local branches of houses whose main establishments were situated in foreign countries. Even as to enemy subjects domiciled abroad the right to maintain actions in respect to property rights accruing after July 31, 1914, remained in effect. Likewise actions other than those for the recovery of debts and the enforcement of property rights, such as those relating to civil status, guardianship, etc., could be maintained by enemy subjects residing outside the Empire.<sup>1</sup> Finally, enemy subjects, even when residing in enemy territory, were allowed the right of defence in actions brought against them in the German courts.

In theory, apparently, the only persons to whom the German courts were closed were those domiciled *outside* the Empire and establishments whose head offices were situated in foreign countries. Local branch houses were free to maintain actions, as were persons domiciled in the Empire. It would seem therefore that the impression which appears to have gained currency in France that Frenchmen residing in Germany had no *persona standi in judicio* was without foundation.<sup>2</sup> There is little available information now as to the manner in which the German ordinance was carried out, but French writers admit that instances were not lacking in which Frenchmen were allowed to

<sup>1</sup> Huberich remarks that non-residents were exposed to one practical difficulty in maintaining actions in the German courts, in that they were required to give security for costs, and no appearance could be entered without a written power of attorney. Ignorance of this rule caused many defendants resident in England and who were cited by substitute service but who failed to appear, to be judged by default and execution levied on their property. Note in the *Jour. of the Soc. of Comp. Leg.*, January, 1915, p. 54.

<sup>2</sup> This was pointed out by Barthélemy and Clunet in the articles cited above. Cf. also Huberich, "German Emergency Legislation Affecting Commercial Matters," in *Law Notes* for June, 1915, p. 48, and the *Jour. of the Soc. of Comp. Leg.*, January, 1915, p. 55.

maintain actions and appear as defendants.<sup>1</sup> Nevertheless, the practical difficulties encountered in exercising the privilege granted appear to have been insurmountable in many cases.<sup>2</sup>

The *Reichsgericht* rendered a decision on July 8, 1915, in which it upheld the right of English subjects domiciled in the Empire to sue in the German courts for the recovery of money due them on contracts, notwithstanding the English prohibition in respect to payments due German subjects.<sup>3</sup> German writers in fact assert that no restrictions were placed upon the right of enemy subjects domiciled in the Empire to bring actions in the courts, that no question was ever raised as to the right of German attorneys to take the cases of such persons, and that there were no instances in which members of the German bar refused to defend enemy persons against whom suits were instituted.<sup>4</sup>

<sup>1</sup> Cf. Barthélemy in 43 *Clunet*, p. 1446, and *Clunet*, *ibid.*, T. 42, p. 567, and T. 43, p. 1131. Cf. also an article by Dr. Arthur Curti, a Swiss jurist, entitled *De la Condition des Sujets Ennemis selon la Législation et la Jurisprudence Allemandes*, 42 *Clunet*, pp. 785 ff.

<sup>2</sup> G. F. in an article entitled *Accès des Sujets Ennemis aux Tribunaux Allemands*, in 44 *Clunet*, pp. 48 ff., calls attention to various other difficulties which made recourse to the German courts by enemy subjects, either as plaintiffs or defendants, even where the right was accorded by law, a practical impossibility.

<sup>3</sup> Soergel, *Kriegsrechtssprechung und Kriegsrechtslehre*, pp. 99, 111.

<sup>4</sup> Cf. an article dealing with the right of enemy aliens to sue in German courts and to employ attorneys, by Dr. Haber, of Leipzig, in the *Juristische Wochenschrift* of April 15, 1916, reprinted in French in 44 *Clunet's Journal*, pp. 448 ff.

## CHAPTER VI

### *TREATMENT OF ENEMY MERCHANT VESSELS IN BELLIGERENT PORTS AT THE OUTBREAK OF WAR; RIGHT OF REQUISITION*

§ 99. Merchant Vessels in Enemy Ports at the Outbreak of the Recent War; § 100. The Old Practice; § 101. Modern Practice; § 102. The Rules of the Hague Convention; § 103. Purpose and Effect of the Convention; § 104. Status of the Convention during the Recent War; § 105. British and French Practice during the Recent War; § 106. Action of Other Governments; § 107. The Case of the *Chili*; § 108. Case of the *Marie Glaeser*; § 109. Case of the *Möwe*; § 110. Decisions by the Prize Court of Egypt; § 111. Status of Refugee Enemy Merchant Vessels; § 112. Status of Yachts; § 113. Decisions of the French Council of Prizes; § 114. German Practice; § 115. Policy of the United States; § 116. The Right of Confiscation; § 117. Decision of the Peace Conference regarding the German Ships; § 118. Right of Belligerents to Requisition Neutral Vessels; § 119. Requisition by the United States and Great Britain of Dutch Merchant Vessels; § 120. Right of Neutrals to Requisition Belligerent Vessels in their Ports; Action of Italy, Portugal, and Brazil.

§ 99. **Merchant Vessels in Enemy Ports at the Outbreak of the Recent War.** The outbreak of the war in 1914 found hundreds of merchant vessels in enemy ports, or on the high seas bound to such ports, in ignorance of the existence of hostilities, having left their last port of departure before the outbreak of the war. The short period antedating the outbreak of war during which hostilities may be said to have been imminent and the suddenness with which the war burst out afforded little opportunity to such vessels to escape, and consequently large numbers were caught either in enemy ports or on the high seas proceeding to such ports.

The exact number of British, French, and Russian merchant vessels which were found in German ports at the outbreak of hostilities is not known, but it appears that the number was not inconsiderable. According to a statement issued by the British Navy League on July 3, 1915, 119 German, 20 Austrian, and 11 Turkish ships were detained in British ports after the outbreak of war, while 18 German and 3 Austrian ships were detained in Egyptian ports. In addition, 119 German, 7 Aus-

trian, and 5 Turkish ships were seized while entering British or colonial ports, or while on the high seas, making a total of 302 enemy vessels which were in the possession of the British government at the time the Navy League report was published. At the outbreak of war between Germany and the United States not less than 100 German and Austrian merchant vessels were lying in the ports of the latter country and those of the insular possessions; at the time of the outbreak of war between Germany and Italy there were 37 German ships in Italian ports; when Germany declared war on Portugal 72 German ships were in Portuguese ports; when the government of Brazil revoked its proclamation of neutrality, 42 Austrian and German ships were lying in the ports of that country. There were also a number of German ships in the ports of China, Cuba, Siam, and Uruguay. What is the status of such ships? May they be seized and confiscated or requisitioned by the belligerent in whose ports they are found at the beginning of hostilities?

§ 100. *The Old Practice.* According to the old practice, all enemy merchant vessels found in port at the outbreak of war or captured on the high seas while proceeding to or from many ports, whether their masters were ignorant of the outbreak of hostilities or not, were liable to capture as "droits of admiralty," and in practice such vessels were usually condemned as good prize.<sup>1</sup> This liability to capture existed in fact long after the practice of appropriating enemy private property on land had generally been abandoned, and not infrequently embargoes on vessels in port were laid in anticipation of war, so that in the event of hostilities they might be confiscated.<sup>2</sup> But, says De Boeck, the practice of seizing without previous notice and on the very day of the declaration of war merchant ships and goods belonging to peaceable citizens who were carrying on their trade under the faith of treaties was too severe.<sup>3</sup> Bluntschli adds that "modern juridical sentiment revolted against the brutal application of the old principle that a belligerent may

<sup>1</sup> Concerning the old practice, cf. De Boeck, *De la Propriété Privée Ennemie sous Pavillon Ennemi*, § 234; Dupuis, *Le Droit de la Guerre Maritime d'après les Conférences de la Haye et de Londres*, p. 163, and Scott, "Status of Enemy Merchant Ships," 2 *Amer. Jour. of Int. Law*, pp. 260-261.

<sup>2</sup> Westlake, *International Law*, Pt. II, p. 42, and Moore, *Digest*, Vol. VII, § 1196.

<sup>3</sup> *Op. cit.*, § 234. Cf. also Bonfils, *Droit International Public*, § 1399.

lay his heavy hand upon enemy merchant ships and the cargoes which they carry.”<sup>1</sup>

§ 101. **Modern Practice.** Accordingly a new practice known as the *indult* or *délai de faveur* was introduced, by which enemy merchant vessels in the ports of the opposing belligerent at the outbreak of war were allowed a certain period to depart without molestation. This favor was first accorded in practice during the Crimean war, when the Porte granted to Russian vessels in Ottoman ports the privilege of departing within a fixed period. France and Great Britain followed the action of the Porte and allowed Russian ships of commerce in their ports at the outbreak of the war six weeks to take on their cargoes and depart. Moreover, Russian merchant ships which had left their port of departure before the outbreak of war were allowed to enter the ports of Great Britain and France, discharge their cargoes, reload, and to depart without molestation.<sup>2</sup> Russia accorded a similar *délai* to British and French ships.<sup>3</sup> At the outbreak of the Franco-German war of 1870-1871 France gave German merchant vessels a period of thirty days in which to depart and allowed those which had entered a French port after the declaration of war in ignorance of the existence of hostilities a similar *délai*. During the Russo-Turkish war of 1877-1878 *délais* were accorded by both belligerents, and at the outbreak of the war between Greece and Turkey in 1897 the Sultan allowed a period of fifteen days during which Greek merchant vessels might depart from Ottoman ports.

Upon the outbreak of the war between Spain and the United States in 1898 the Spanish government accorded a *délai* of five days to American ships in Spanish ports to depart, but did not expressly prohibit their subsequent capture on the high seas, nor did it provide for the entrance and departure of American ships which had sailed for Spanish ports before the war. The American government granted a *délai* of thirty days (from April 21 to May 21) to Spanish vessels in American ports. The American proclamation further exempted Spanish vessels which prior to April 21 (the date of the beginning of actual hostilities)

<sup>1</sup> *Droit International Codifié*, Fr. trans. by Lardy, art. 669.

<sup>2</sup> See the texts of the French decree and the British order in council, in *International Law Situations*, 1906, pp. 48-49.

<sup>3</sup> *Ibid.*, pp. 48-49, and Bonfils, *op. cit.*, § 1399.



had sailed from a foreign port bound for a port in the United States, and allowed them to enter American ports, discharge their cargoes, and depart without molestation. Under an interpretation of the Supreme Court this liberal privilege was extended to cover the case of a Spanish merchant vessel which had sailed from an American port before the beginning of hostilities.<sup>1</sup> During the Russo-Japanese war (1904-1905) the Japanese government granted a *délai* of seven days to Russian vessels in Japanese ports, and accorded to Russian vessels which had sailed for a Japanese port before the outbreak of the war the right to enter, discharge their cargoes, and depart. But the Russian government accorded a *délai* of only forty-eight hours to Japanese vessels in Russian ports, and granted no privilege of entrance and departure to Japanese vessels which had sailed for Russian ports before the beginning of hostilities.

Thus it will be seen that during the more important wars since 1854 in which the belligerents were maritime powers, enemy merchant ships in their ports had been allowed a certain period to depart, and in most of them enemy ships encountered on the high seas bound to such ports in ignorance of hostilities had been allowed to enter, discharge their cargoes, and depart freely. As to the extent of the *délai* accorded, however, there was no uniform practice, and in some instances, as that of Russia in 1904, the period was much restricted. The privilege thus accorded, moreover, was considered as an act of grace and not a right, and each belligerent was free to grant the favor or withhold it at its pleasure and, if it was granted, to limit and restrict it under such conditions as it saw fit.

§ 102. **The Rules of the Hague Convention.** The desirability of a general, if not an obligatory, rule governing the practice was felt by many publicists, and at the Second Hague Conference the matter was the subject of lengthy discussion. Proposed rules were submitted to the conference by the delegations of Russia, the Netherlands, France, Sweden, and Great Britain,

<sup>1</sup> The *Buena Ventura*, 175 U. S. 388. The American proclamation, however, expressly withheld the favor thus granted from Spanish ships having on board enemy military or naval officers, contraband goods, despatches from or to the Spanish government, or coal, except such as might be necessary for the voyage. Cf. the cases of the *Panama*, 175 U. S. 535, and the *Pedro*, 75 U. S. 354. Cf. also Benton, *International Law and Diplomacy of the Spanish-American War*, pp. 130 ff. and 166 ff.

and views were expressed by the delegates of various other governments.<sup>1</sup> There was a general agreement that a reasonable period ought to be allowed merchant vessels in enemy ports to depart freely and that those met on the high seas unaware of the existence of war should be allowed to enter, discharge their cargoes, and depart without molestation; but it was not thought desirable to prescribe a fixed rule as to the duration of the *délai* to be accorded, for, as Wehberg remarks,<sup>2</sup> the speed with which loading or unloading is carried out differs greatly in various ports, and besides, it may be necessary for one vessel having a longer voyage before it to lay in a special store of victuals, thus requiring a longer period, while another may be able to load and get away in a much shorter time. Concerning the question as to whether the privilege should be regarded as a right or a favor, there was a difference of opinion among the delegates. A majority of them, including those of the United States, Germany, and Russia, felt that the privilege had been so long and generally observed that it had acquired sufficient international force to be treated as a right rather than an act of grace; but to this view the delegates of Argentina, France, Japan, and especially those of Great Britain were opposed. Each belligerent, according to their view, should be left at liberty to act as its own national interests might require. On account of this opposition the final agreement of the conference was a compromise which on some points represents reaction rather than progress, and secures to commerce a less favorable position than it enjoyed before. The results of the discussion were embodied in a separate convention (VI) signed October 18, 1907, article 1 of which affirmed that it was desirable that a reasonable period should be allowed for enemy vessels to depart and return to their own country or another country. If no such permission was accorded, they were not to be confiscated, but might be detained until the end of the war, or requisitioned upon payment of compensation. Article 3 provided that merchant vessels which had left their last port of departure before the outbreak of the war and were encountered on the high seas

<sup>1</sup> For an analysis of the several proposals submitted, cf. Higgins, *The Two Hague Peace Conferences*, p. 302, and *International Law Situations*, 1910, pp. 68-70.

<sup>2</sup> *Capture in War on Land and Sea* (Eng. trans. by Robertson), p. 55.

while still ignorant of the existence of hostilities could not be confiscated, but might be detained or requisitioned.

Article 5 provided that the convention should not apply to merchant ships whose construction shows that they are intended for conversion into war ships,<sup>1</sup> and article 6 stipulated that the convention should not apply except between the contracting powers and then only when all the belligerents were parties.

§ 103. **Purpose and Effect of the Convention.** The purpose of the convention as declared in its preamble was to "insure the security of international commerce against the surprises of war" and to "protect as far as possible operations undertaken in good faith and in process of being carried out before the outbreak of hostilities."

As finally adopted, the convention imposed no obligation upon belligerents to allow a *délai de faveur*, but merely affirmed the desirability of allowing it. They are therefore free, as before, to accord or withhold the privilege, and if it is denied, there is no legal ground for complaint.

The most important change in the old practice as introduced by the convention was the abolition of the right of confiscation of both ships and their cargoes, and the substitution of detention with an obligation to restore the vessels at the close of the war. But both ships and cargoes may be requisitioned or destroyed upon payment of compensation provided that in case of destruction adequate provision is made for the safety of all persons on board. Moreover, the convention exempts from capture

<sup>1</sup> This article was inserted at the instance of the British delegate Lord Reay. It was evidently aimed at subsidized steamers constructed according to special designs which make them easily convertible into cruisers, and in pursuance of an arrangement between the subsidizing government and the owner. The article was opposed by the German delegate, Herr Kriege, who asserted that there were no steamships which were not capable of being converted into war vessels or which could not be used for mine-laying or other subsidiary naval operations. The proposed article might therefore be so interpreted as to exclude from the benefit of the *délai de faveur* all ships except sail boats. *Actes et Documents*, p. 1033. Cf. also Wehberg, *Capture in War on Land and Sea*, p. 59, who observes that "every steamer of high speed can also be employed as an auxiliary cruiser, and every vessel, at any rate, in mine-laying." Cf. also Hall (*International Law*, 6th ed., p. 611), who remarks that while experts are perfectly able to distinguish vessels built primarily for warlike use, it is otherwise with many vessels intended primarily for commerce. "Mail steamers of large size are fitted by their strength and build to receive without much special adaptation one or two guns of sufficient caliber to render the ships carrying them dangerous cruisers against merchantmen."

during the course of their return voyage ships thus allowed to depart, and also those having sailed from their last port of departure before the outbreak of war and which are encountered at sea while their masters are still ignorant of the existence of a state of hostilities, an immunity not always allowed in the past. The American delegation objected to the form of the latter immunity, because it was conditioned upon the ignorance of hostilities on the part of the master, a condition which it declared was no part of the existing practice and which largely neutralized the apparent benefits of the convention. For this and other reasons which, it was said, put commerce in a less favorable situation than before, the American delegation refused to sign the convention and recommended that it be not ratified by the government of the United States.<sup>1</sup>

§ 104. **Status of the Convention during the Recent War.** Among the belligerents in the recent war Bulgaria, Italy, Montenegro, Servia, the United States, and Turkey had never ratified the convention or any part of it. In accordance with article 6, therefore, its terms were not legally binding on any one of the thirty belligerents. Germany and Russia reserved their ratification of article 3 and paragraph 2 of article 4 which substitute detention in the place of confiscation in respect to vessels (and their cargoes) encountered on the high seas in ignorance of hostilities. The reason alleged for their reservations was that the provisions mentioned established an inequality between States by imposing burdens upon those which, lacking naval stations in different parts of the world, are not always in a position to take into a home port the vessels which they seize and which therefore they might be under a necessity of destroying or allowing to go free. In the former case they would be compelled to indemnify the owners of the vessels destroyed.<sup>2</sup> In consequence of Germany's reservation of the two provisions mentioned, German merchant vessels which were encountered at sea by British and French cruisers during the late war, and which had sailed from their port of departure before the outbreak of the war, and whose masters were still ignorant of the existence of hostilities, were not entitled to the

<sup>1</sup> Cf. their report in Senate Document No. 444, 60th Congress, 1st session, p. 38. See also Dupuis, *op. cit.*, p. 169, for a similar criticism.

<sup>2</sup> *Actes et Documents*, Vol. I, p. 235; Vol. II, p. 954.

benefits of these provisions and were therefore confiscated instead of detained. On the other hand the German government was under no legal obligation to make compensation for the British and French vessels which were encountered on the high seas under similar circumstances and which were destroyed by German cruisers. It turned out in practice, however, that Germany's loss in consequence of her reservation of the two provisions mentioned greatly exceeded the gain, for while few British or French vessels were encountered on the high seas by German cruisers under the circumstances set forth in article 3, a considerable number of German ships were encountered by British and French cruisers, and instead of being detained were, as said, condemned and confiscated.

§ 105. **British and French Practice during the Recent War.** It does not appear that in any case was an embargo laid in anticipation of the war upon merchant vessels in port prior to the outbreak of the war.<sup>1</sup>

At the outset the German government proposed to the governments of Great Britain, France, Russia, and Belgium<sup>2</sup> that days of grace be allowed to merchant vessels in enemy ports to depart unmolested. By a decree of the French government dated August 4, 1914, German merchant ships found in French ports since August 3 at 6.45 P.M. or entering since that date in ignorance of hostilities were promised a *délai* of seven days in which to depart freely, and after being furnished with a passport would be allowed to proceed to their port of destination or to such other ports as might be designated by the maritime authorities of the French port in which they might be found. By a decree of August 13 a similar favor was granted to Austrian and Hungarian ships found in French ports prior to midnight

<sup>1</sup> It was reported, however, that all foreign ships in German ports were detained after August 1, 1914, on the ground that mines were being laid and other precautions taken. In consequence of the demand of the British government, on August 2 the British ambassador at Berlin was informed that British ships would be allowed to depart; but it has been stated that none in fact were permitted to leave.

<sup>2</sup> On the night of August 4, 1914, the British secretary of state for foreign affairs received the following notice from the German ambassador: "The Imperial government will detain merchant vessels flying the British flag and which are interned in German harbors, but will liberate them if the Imperial government receives a counter undertaking from the British government within forty-eight hours." A similar notice was handed to M. Viviani, president of the council, on August 3 at the time of the declaration of war against France.

of the previous day. In consequence, however, of Germany's reservation of article 3 and paragraph 2 of article 4 of the above-mentioned Hague convention the benefits accorded by the French decree were not to apply to German ships which had left their last port of departure before August 3, 1914, at 6.45 P.M. and which might be encountered on the high seas in ignorance of hostilities. Nor was the benefit to apply to ships whose construction, armament, or equipment indicated that they were "susceptible" of being transformed into war ships or for the public service.<sup>1</sup> On the same day (August 4) a British order in council was issued by which it was provided that in the event one of His Majesty's principal secretaries of state should be satisfied by information reaching him not later than midnight of August 7 that the treatment accorded to British merchant ships and their cargoes which at the outbreak of hostilities were in the ports of the enemy or which subsequently entered them, was not less favorable than the treatment promised to enemy merchant vessels by the British order in council, German merchant vessels under 6000 tons burden which at the date of the outbreak of hostilities were in any British port should be allowed until midnight on August 14 (a *délai* of ten days) for loading and departing. On August 5 a copy of this order in council was communicated to the American ambassador at London, who had taken charge of German interests in England, with a request that he inquire of the German government whether it was prepared to accord reciprocity of treatment to British vessels. Upon inquiry at the American embassy shortly before midnight on August 7 it was ascertained that no communication had been received from Berlin. The lords commissioners of the treasury and the lords commissioners of the admiralty were therefore notified by Sir Edward Grey that articles 3 to 7 of the order in council relative to the treatment proposed to be accorded to enemy merchant ships in British ports at the outbreak of hostilities or subsequently entering them would not come into operation. Every effort, says the attorney-general in his argument in the case of the *Chili*, was made between August 4 and August 7 to obtain satisfactory assurances from the German government that reciprocity of treatment would

<sup>1</sup> Text of the French decree in 22 *Rev. Gén. de Droit Int. Pub.* (1915), Documents, pp. 9-10.



be accorded to British vessels, but no information was received, and therefore the privilege of departure could not be accorded to German vessels. It is said that the British proposal was not received in Berlin until the morning of August 8, the day after expiration of the time limit set by the British order in council.<sup>1</sup> British vessels in German ports and German vessels in British ports were consequently detained.<sup>2</sup>

§ 106. *Action of Other Governments.* The Austro-Hungarian government, however, agreed to accord reciprocity of treatment to British vessels, and consequently the merchant ships of Austria and Hungary were allowed to depart freely, and their government having ratified the Hague convention without reservation, Austrian and Hungarian vessels encountered at sea in ignorance of hostilities were allowed to enter British ports, discharge their cargoes, and leave without molestation. Upon the outbreak of war between Japan and Germany the Japanese government granted a *délai* of two weeks to German vessels in Japanese ports to discharge their cargoes, take on new cargoes of non-contraband goods, and to depart freely for designated ports. A like favor was accorded to German vessels which entered Japanese ports in ignorance of the outbreak of hostilities, and to those met by Japanese war ships on the high seas and which were bound for Japanese ports in ignorance of hostilities. These favors, however, were all conditioned upon reciprocity of treatment by Germany.

The Turkish government not having ratified the convention, its benefits were not accorded to Ottoman merchant ships in British ports.<sup>3</sup> The governments of the United States, Brazil, China, Cuba, Italy and Uruguay appear not to have accorded any days of grace for the departure of enemy ships in their ports.

§ 107. *The Case of the Chili.* The first case involving the status of merchant vessels in enemy ports at the outbreak of the war was that of the *Chili*, a German bark seized at Cardiff on August 5, 1914, a state of war having been declared to exist between Great Britain and Germany as from 11 P.M. on August 4.

<sup>1</sup> Huberich, *The Prize Code of the German Empire as in Force July 1, 1915*, p. xxi.

<sup>2</sup> Belgium accorded three days of grace to German ships in Belgian ports at the outbreak of war, and presumably Germany accorded reciprocity of treatment.

<sup>3</sup> Proclamation of August 5, 1914. Text in *Proclamations, Orders in Council and Documents*, issued by the Canadian government, p. 147.



As it was the first case to be tried in a British prize court in sixty years,<sup>1</sup> the proceedings attracted much interest on the part of the bar and the general public.<sup>2</sup> Sir John Simon, the attorney-general, took occasion to give a résumé of the history of the prize court and to call attention to the changed conditions under which the prize jurisdiction was exercised today. Then turning to the facts in the case of the *Chili*, he asked that an order be issued for its detention, since the owners were not entitled to the benefit of the *délai de faveur* provided for in the sixth Hague convention, His Majesty's government not having received within the prescribed period information from the German government of Germany's intention to accord reciprocity of treatment to British vessels. The judgment of the court was that the ship had been lawfully seized as a "droit of admiralty" and should be detained until a further order was issued by the court.<sup>3</sup> In numerous similar cases involving the status of enemy vessels in English ports at the outbreak of the war, the prize court issued decrees of detention instead of condemnation.<sup>4</sup>

§ 108. Case of the *Marie Glaeser*. The case of the *Marie Glaeser*, decided September 11, 1914,<sup>5</sup> involved the application of article 3 of the Hague convention, which exempts from confiscation enemy merchant vessels which have left their last

<sup>1</sup> The last prize case had been heard by Dr. Lushington during the Crimean war.

<sup>2</sup> "A simple ceremony," says the *London Times*, "characterized the opening of the proceedings. At 11 o'clock the judge entered the court, preceded by the marshal of the admiralty bearing the ancient and beautiful silver oar which was placed upon the rests before the judge's desk."

<sup>3</sup> See the full report of the case in Trehern, *British and Colonial Prize Cases*, Vol. I, pp. 1-12. The order of detention issued in this and like cases did not of course definitely determine the rights of the crown. These rights could only be finally determined when it was known what treatment was being accorded by Germany to British ships in German harbors. Orders of detention might therefore be subsequently superseded by orders of condemnation. *The Law Magazine and Review* of November, 1914, p. 76, called attention to the fact that decrees of detention were unknown to prize procedure, and it suggested that it would have been better if, instead of making such orders, the cases had been simply adjourned, since there might be some question as to whether a decree of detention once made could be superseded by a decree of condemnation in the future.

<sup>4</sup> Thus at its sitting on September 11, 1914, orders of detention were made by the court in the cases of sixteen vessels which, like the *Chili*, were in British ports at the outbreak of the war. These cases are reported in Trehern's collection cited above.

<sup>5</sup> Trehern, *op. cit.*, Vol. I, pp. 38 ff.

port of departure before the outbreak of war and are encountered on the high seas while still ignorant of the outbreak of hostilities. The *Marie Glaeser* was a German merchant vessel which left a British port some hours before the declaration of war by Great Britain against Germany and was captured at sea on August 5 while still ignorant of the outbreak of hostilities. In consequence of Germany's reservation of article 3 the owners of the ship were not entitled to the benefit of the favor which it allows, and the ship was therefore condemned as good prize and not merely ordered to be detained, as was done in the case of the *Chili* which came under articles 1 and 2 of the convention. The same decision was reached in the case of the *Perkero*, a German bark which sailed from New York for Hamburg on July 14 and was captured off Dover on August 5, while the master was still ignorant of the outbreak of hostilities.

§ 109. Case of the *Möwe*. In the case of the *Möwe*<sup>1</sup> the prize court was called on to determine the meaning of the term "port" as used in the sixth Hague convention. The *Möwe* was a German merchant vessel which was captured on August 5, 1914, at a place in the Firth of Forth which was not within the limits of a "port" in the usual commercial sense, yet was within the "port" of Leith for customs purposes. The owners claimed that the vessel was in a port and not on the high seas at the time of capture, and could not, therefore, be condemned, but could only be detained in accordance with the Hague convention. But the court held that the word "port" as used in articles 1 and 2 of the convention had a special and restricted meaning, namely, a place where cargoes are loaded and unloaded, and did not comprehend the limits of a customs district. In short, it did not mean the fiscal port. Where the Hague convention, said the court, intended to deal with territorial waters, the words *les eaux territoriales* were employed in contradistinction to *les ports* (cf. for example convention XII, articles 3 and 4, and convention XIII, articles 2, 3, 9, 10, etc.). The court also pointed out that the words "encountered on the high seas" in article 3 of convention VI are not an accurate rendering of the French *rencontrés en mer*. In fact, where it was intended to refer to the high seas the words *en pleine mer* or *en haute mer* were used. Having been "encountered at sea" within the

<sup>1</sup> Trehern's Cases, Vol. I, p. 60.

meaning of article 3 of the convention, the ratification of which Germany had reserved, the ship was not entitled to the benefits of the said article, and it was therefore condemned as lawful prize.

In this case the prize court finally disposed of the question of the right of an enemy subject to appear before the court as a claimant. This question had been raised in the cases of the *Chili* and the *Marie Glaeser*; but a decision on the point was not necessary to the judgment, and on account of the insufficiency of the affidavits and because no specific circumstances were shown which would entitle the enemy to appear, the appearance was struck out. In the present case, however, the owner set up the plea that he was entitled under the terms of the Hague convention to appear and resist condemnation of his ship. Without passing definitely on the question of whether the Hague convention was legally binding on the court, since that was not necessary to the judgment, Sir Samuel Evans announced that in pursuance of the inherent power of the court to regulate and prescribe its own rules of practice, except where fettered by enactment, he would direct that whenever an enemy ship-owner claimed a privilege or immunity under any of the Hague conventions of 1907, he would be allowed to appear as a claimant and argue his claim before the court, provided his claims were sufficiently stated in the affidavit which the prize court rules of 1914 required.<sup>1</sup>

§ 110. **Decisions by the Prize Court of Egypt.** The cases of the *Gutenfels*, the *Barenfels*, the *Marquis Bacquehem*, the *Achaia*, the *Pindos*, and the *Concadoro*, decided by the British prize court at Alexandria in January, February, and March, 1915, involved the status of enemy vessels in Egyptian ports at the outbreak of the war.

The *Gutenfels* was a German steamship which arrived at Port Said on August 5, 1914, ignorant of the outbreak of hostilities, and although no safe-conduct was offered her, she was at liberty to leave at any time during a period of two months. On October 13 she was boarded by an officer of the Egyptian army and escorted out to sea, where she was seized as a prize by a British cruiser at a place some three or four miles out of the port and taken to Alexandria. The procurator asked the court to condemn the ship on the ground that the court could not go behind

the seizure by the British cruiser. It was, he maintained, a case of an enemy ship cognizant of the existence of war, encountered and captured on the high seas, and in consequence of Germany's reservation of article 3 of the Hague convention, she was liable to condemnation and not mere detention. But the court rejected this view of the case. In view of the fact that the ship had been forced by the British authorities to leave, the court felt justified in looking behind the actual circumstances of the seizure on the high seas and in inquiring into the events which led up to the capture. Turning to the contention of the claimants that the ship should be restored on the ground that Port Said was a neutral port whose neutrality had been guaranteed by the Suez convention, the court proceeded to review at length the history and nature of this convention and the status of enemy ships which had taken refuge in Port Said. The conclusion reached was that it was not the intention of the convention to grant an indefinite refuge to ships in the canal or in the ports auxiliary thereto, but only to insure a free and uninterrupted passage. Ships have the right to free passage through the canal, it was said, but when they abandon the intention of going through, they cease to have any rights under the convention. The *Gutenfels* was in exactly the position that she would have been in, had she been in the port of Alexandria. Since the outbreak of war Egypt could not be regarded as neutral territory, and the *Gutenfels* having been taken possession of by Egyptian officials and escorted out to sea at the instigation of Great Britain and there seized as prize by a British cruiser, she must be considered as having been captured in a belligerent port. As in the case of the *Chili* an order was, therefore, issued for her detention. The *Barenfels*, likewise a German steamer, arrived at Port Said on August 1, four days before the outbreak of the war, and continued to remain, using the port as a place of refuge. She was at liberty to leave at any time from August 14 to October 13, although no safe-conduct was offered her. She was then boarded by Egyptian officers, taken out to sea, and on October 16 was handed over to a British cruiser and taken to Alexandria for adjudication. Except for the fact that the *Barenfels* was already in Port Said at the outbreak of the war — a circumstance which for the purpose of the judgment was immaterial — the case was not distinguishable from that

of the *Gutenfels*. Both the presiding judge and his associate, who dissented, considered at length in separate opinions the question as to whether the court was bound by the Hague convention, and they were in agreement that it was so bound; but they disagreed as to the form which the order should take, that is, whether it should be definitive or merely temporary, depending on the conduct of Germany.

The *Concadoro* was a registered Austrian ship which arrived at Port Said on August 18 in ignorance of the outbreak of hostilities. Among other things it was urged that the vessel was a "merchant ship which, owing to circumstances beyond its control was unable to leave port within the period contemplated," since the master did not have sufficient funds with which to buy coal and provisions to continue his voyage.

Concerning the plea that the lack of funds constituted a case of *force majeure* within the meaning of article 2 of the convention, the court thought such an interpretation would be stretching the meaning of the term and could not be admitted, all the more so because the consigners of the cargo had in fact offered the master a loan of \$530 with which to pay port and other dues. An order for the confiscation of the ship was therefore issued.<sup>1</sup>

§ 111. Status of Refugee Enemy Merchant Vessels. The vessels referred to in the preceding section entered Egyptian ports in ignorance of the existence of hostilities. In the cases of the *Prinz Adalbert* and the *Kronprinzessin Cecilie*,<sup>2</sup> the ques-

<sup>1</sup> In this connection a decision of the Belgian prize court at Antwerp interpreting the meaning of the term *force majeure* as employed in article 2 of the Hague convention may be cited. At the outbreak of the war the Belgian government gave three days of grace to a number of German vessels that were lying in the port of Antwerp. As no advantage was taken of the *délai de faveur*, the vessels were seized. At the hearing before the prize court the owners, the North German Lloyd Company, set up the plea that the vessels were not liable to condemnation, because "circumstances beyond their control" made it impossible for them to leave. The *force majeure* alleged consisted in the departure of the ship's officers and crews to rejoin the German forces conformably to the German order of mobilization and the consequent inability of the company to procure fresh crews before the expiration of the period of grace allowed. But the court declined to admit the plea, on the ground that the *force majeure* contemplated by the Hague convention did not include inability to depart because of the abandonment of the ship by its officers and crews for the purpose of joining the forces of the enemy. Phillipson, *International Law and the Great War*, p. 79.

<sup>2</sup> Trehern's Cases, Vol. III, p. 70. Cf. also the decision of the prize court of Siam referred to below.

tion was presented to the British prize court as to whether enemy merchant vessels which had sought refuge in a British port in order to escape capture from French warships were liable to condemnation. Both were German ships and while on their way from American to German ports learned of the outbreak of war between Germany and France. War between Great Britain and Germany not having broken out, they ran into the port of Falmouth, where after declining to avail of the permission offered to leave, they were seized the day after Great Britain declared war against Germany. Sir Samuel Evans held that they were not entitled to the benefit of the sixth Hague convention, since the declared purpose of the convention was "to insure the security of international commerce against the surprises of war." Their masters, he said, did not enter the port of Falmouth in "pursuance of any commercial undertaking," but for totally different purposes, such as were not contemplated by the Hague convention. Both vessels were, therefore, condemned as "droits of admiralty."

On appeal to the judicial committee of the privy council, their lordships, entertaining doubt as to the purposes of the convention, reserved their decision, but expressed an opinion that an order of detention rather than of condemnation should be made until the policy of Germany was known. The question was a difficult one, but the argument of the president of the prize court that a vessel which takes refuge in port during the course of a commercial voyage is "not taking part in any commercial operation whatever" was exceedingly technical and affords a striking illustration of the partisanship, unconscious though it may be, which is apt to characterize the decisions of national prize courts when adjudicating the rights of enemies.<sup>1</sup>

§ 112. Status of Yachts. In the cases of the *Oriental* and the *Germania*<sup>2</sup> the question arose whether private yachts seized

<sup>1</sup> Cf. Gregory in 13 *Amer. Jour. of Int. Law*, p. 91. The French prize council held that the benefits of the convention did not extend to the case of an enemy merchant vessel which had taken refuge, at the beginning of the war, in a neutral port to avoid capture and which was captured two years later under circumstances which did not entitle it to invoke the pretended neutrality of the territorial waters in which it was captured. 26 *Rev. Gén. de Dr. Int. Pub., Jurisp.*, p. 11.

<sup>2</sup> Trehern, *British and Colonial Prize Cases*, Vol. II, p. 365. A Belgian yacht, the *Primavera*, seized by the Germans when they entered Antwerp, was condemned by the German prize court on the ground that the convention did not apply to pleasure yachts. Text of the decision in 44 *Clunet*, 1804.



in enemy ports at the outbreak of the war come within the terms of the Hague convention VI. The *Oriental* was a yacht belonging to a Hungarian subject, and was seized at Cowes after the outbreak of the war between Great Britain and Austria-Hungary. The Austro-Hungarian government having granted days of grace to British vessels, the *Oriental* was allowed a certain number of days to leave "as a matter of fairness due to the comity of nations," notwithstanding the fact that the immunities provided by the Hague convention apply only to merchant vessels. For certain reasons the yacht was unable to avail itself of the privilege of departure. The prize court, therefore, condemned it and ordered it to be sold.

The *Germania* was a racing yacht owned by Gustav Krupp von Bohlen, a German subject, and was seized as a "droit of admiralty" at Cowes on August 6, two days after the outbreak of war between Great Britain and Germany. Germany, unlike Austria-Hungary, not having accorded days of grace to British ships to leave German ports, no days of grace were offered to the *Germania* in which to leave. Counsel for the owners argued that although not a merchant vessel, the *Germania* came within the spirit of the Hague convention. Yachts were not specifically mentioned, because it was not imagined that private property of this kind in a belligerent port at the outbreak of the war would be condemned. By the comity of nations since 1854 days of grace had been granted to merchant vessels, and *a fortiori* a racing yacht which had come practically as a guest to the Cowes regatta should have been given an opportunity to leave. Sir Samuel Evans, however, refused to adopt this view, and he issued an order of condemnation. The preamble to the Hague convention, he said, showed that the purpose of the convention was to protect only ships engaged in commerce, and by its express terms the immunities which it provided applied only to merchant vessels (*navires de commerce*). Racing yachts could not be brought within these terms, and the case must be decided on the basis of the law and not on the basis of any supposed spirit of the convention. During the course of the argument of the solicitor-general as to whether the ship came within the terms of the Hague convention, Sir Samuel Evans interrupted him to say that "assuming for the moment that the vessel is within the Hague convention, I am not sure that a serious ques-



tion may not arise some day whether Germany can complain of anything that is done in violation of the Hague convention. An agreement, whether made between individuals or States, must be observed by both sides, and someone may have to determine whether Germany has so far adhered to the Hague convention that she can call upon any other party to observe it." To this the solicitor-general replied: "If I am a law officer at the time I shall most certainly contend that a power which it would be easy to show has violated many of its important provisions, cannot be heard in this or any other court to contend that we are bound by the remaining provisions."

As to the status of enemy tugs, lighters, and floating craft in British ports at the outbreak of the war, the British prize court ruled that they did not belong to the category of "small boats engaged in local trade" which are exempt from capture under the eleventh Hague convention, but were "merchant vessels" within the meaning of the sixth convention.<sup>1</sup>

§ 113. **Decisions of the French Council of Prizes.** The French *conseil des prises* adopted essentially the same policy as the British prize court in a number of cases involving the status of enemy merchant ships in French ports at the outbreak of the war, or which were encountered at sea, having sailed from their last port of departure before the declaration of war and being ignorant of the existence of hostilities. In the case of the German steamer *Porto*,<sup>2</sup> which had left its last port of departure before the beginning of the war between France and Germany and which was encountered at sea (*rencontré en mer*) in ignorance of the existence of hostilities, and captured by a French cruiser, the prize council held that in consequence of Germany's reservation of article 3 and paragraph 4 of the sixth Hague convention, the owners of the ship and the cargo<sup>3</sup> were not entitled to the benefits of these provisions. The ship and cargo were therefore condemned as

<sup>1</sup> Trehern's *Cases*, Vol. III, pp. 439, 470.

<sup>2</sup> Text of the decision in 23 *Rev. Gén. de Droit Int. Pub.* (1916), *Jurisprudence*, p. 66. The French prize council, unlike the British prize court, was composed of five judges.

<sup>3</sup> A "cargo," said the court, "being transported under an enemy flag is presumed to be an enemy cargo until the contrary is proved." The cargo was claimed by a French company, but no sufficient evidence of French ownership was presented to the prize council. It was, therefore, presumed to be enemy property and was condemned with the ship.

good prize and adjudged to the commander, officers, and crew of the capturing vessel.<sup>1</sup> The personal effects of the captain and crew were, however, ordered to be restored to their owners.

In the cases of the *Barmbek*, the *Frieda Mahn*, the *Martha Bockham*, and the *Czar Nicolai II*, all German vessels which had sailed from their last port of departure before the outbreak of war and which were met on the high seas while in ignorance of the outbreak of hostilities, the council of prizes made decrees of condemnation. In the case of the *Czar Nicolai II* the owners set up the plea that the reservations made by Germany in ratifying the Hague convention had a limited weight and applied only to the second part of article 3, which establishes an inequality between the powers which have numerous ports on the seas to which their prizes can be carried and those which, like Germany, have no such ports; that Germany's objections to the convention had reference only to the provisions which forbid destruction and requisition without compensation; that Germany had always maintained that ships encountered at sea should be allowed to continue their voyages conformably to the principles laid down in the first three articles of the convention; that having few colonial ports, she would rarely have occasion to seize, confiscate, or requisition enemy ships encountered at sea, and that, in consequence, the owners of the *Czar Nicolai II* and her cargo should be compensated. But the council decided that whatever may have been the motives of the German government in reserving its ratification of certain parts of the convention, the reservation covered the whole of article 3, the provisions of which were indivisible; and in consequence of the refusal of Germany to promise not to capture French vessels encountered at sea in ignorance of hostilities, German subjects could not claim the benefits of the immunity provided by the convention.<sup>2</sup>

<sup>1</sup> The same decision was reached in the case of the *Walküre*. In this case the question was presented to the council of prizes whether a German vessel seized near an island at a place 300 metres from the shore, where it was moored by means of buoys, was "in port" or "encountered at sea." The council decided that it was seized at sea and not in port, and in consequence of Germany's reservation of paragraph 4 of article 3 of the convention, the vessel was not entitled to the benefit of the article. It was, therefore, condemned and confiscated. Text of the decision in 24 *Rev. Gén. de Droit Int. Pub.* (1917), *Jurisprudence*, pp. 24 ff.

<sup>2</sup> The texts of the decisions rendered by the *Conseil des prises* in the above-mentioned cases may be found in 22 *Rev. Gén. de Droit Int. Pub.* (1915), *Juris-*

§ 114. **German Practice.** The only reported case involving the interpretation of the sixth Hague convention by the German prize courts was that of the *Fenix*.<sup>1</sup> This was a Russian steamer captured by a German torpedo boat on August 2, 1914, after the outbreak of the war between Germany and Russia, the capture taking place near the mouth of the Elbe, about one hundred kilometres from Hamburg. The vessel had left its last port of departure before the commencement of hostilities and was proceeding to a German port while still ignorant of the existence of war. At the trial before the prize court the owners relied upon the above-mentioned Hague convention and asked to be accorded the benefits of article 1. This provision, it will be recalled, affirms that it is desirable that the right to depart freely shall be allowed to such vessels as have *entered* an enemy port in ignorance of hostilities. The Imperial supreme prize court at Berlin, affirming on appeal the view of the prize court at Hamburg, admitted the binding force of article 1, paragraph 2, of the convention, notwithstanding the fact that the convention had not been ratified by all the belligerents and notwithstanding also that the particular paragraph had not been incorporated in the German prize regulations. But on the ground that the *Fenix* had not "entered" a German port at the time of its capture, but was still at sea, the court held that it did not come within the category of vessels referred to in article 1, paragraph 2, and therefore must be condemned as good prize. That paragraph, it was said, protected only vessels which were actually in an enemy port in ignorance of hostilities at the time of capture and not those which were merely "entering." True, the ship was already in the Elbe and therefore within German jurisdiction, but it was not within a "port." The court pointed out that this strict interpretation had been adopted by the British prize court in the case of the *Möwe*,

*prudence*, pp. 1-12. Italian policy was similar to that of Great Britain and France. By a decree of May 30, 1915, all Austrian merchant ships in Italian ports, which were susceptible of being converted into auxiliary cruisers, were placed in the custody of the prize commission for condemnation. All others were requisitioned by the Minister of Marine. There were 21 vessels of both classes. The facts are detailed in 24 *Rev. Gén. de Dr. Int. Pub.*, pp. 337 ff. As to the treatment of German vessels, see below, § 120.

<sup>1</sup> Text in *Zeitschrift für Völkerrecht*, Bd. IX (1915), pp. 103 ff. An English translation of the decision may be found in the *Amer. Jour. of Int. Law*, Vol. X, pp. 909 ff.

where it was held that a German vessel captured within the inner waters of the Firth of Forth was not "in port" but "at sea." Article 3 of the convention, which prohibits the confiscation of enemy merchant vessels which left their last port of departure before the commencement of war and which are encountered at sea, clearly covered the case of the *Fenix*; but the German government had reserved its ratification of this article, and it was not therefore binding. Moreover, the British and French prize courts had refused to accord the benefit of the article in the case of German vessels encountered at sea under similar circumstances, and Germany could not therefore be expected to grant the benefit to British and French merchant vessels or those of their allies.

The interpretation of article 1, paragraph 2, in this case was strict and narrow, but it was no less so than that of the British prize court in the case of the *Möwe*.

§ 115. **Policy of the United States.** When war broke out between Germany and the United States in April, 1917, there were, as already stated, some one hundred German and Austrian merchant vessels in the continental or colonial ports of the United States. On account of the British blockade of Germany there were of course no American vessels in German ports. In character the German ships in American ports ranged all the way from petty barks of less than 100 tons to the gigantic *Vaterland* of 57,000 tons. Altogether they constituted the flower of the German merchant marine, and the aggregate value of the ships was estimated at not less than \$100,000,000. Unlike the German ships caught suddenly in British ports at the outbreak of the war, they had been lying in American ports for more than two years and a half, having taken refuge there while the United States was a neutral power in order to escape capture by British and French cruisers. After the outbreak of the war between the United States and Germany the German ships were taken possession of, guards placed upon them, their crews removed and interned as German reservists, and measures were taken to repair the ships and place them in a seaworthy condition. It was stated that this measure, however, was not taken with a view to the confiscation of the vessels, but merely as a precautionary measure to prevent them from being injured or destroyed and to safeguard the right of the United States

to requisition and use them in case of necessity, in accordance with the terms of the sixth Hague convention. In fact, it was found when the port officials took possession of the vessels that many of them had been seriously damaged by their officers and crews and thereby rendered unseaworthy, this apparently on the instructions of the German government.<sup>1</sup>

To remove all doubt as to the authority of the President to take such a measure, Congress in April, 1917, adopted a joint resolution authorizing him to "take over to the United States the possession and title" of such vessels and to "operate, lease, charter and equip them in any service of the United States or in any commerce, foreign or coastwise." On June 30 the President issued an order authorizing the shipping board to "take possession and title" of eighty-seven of the German ships and to repair, equip, and operate them in accordance with the terms of the joint resolution.<sup>2</sup> Neither the joint resolution nor the executive order issued in pursuance thereof contained any intimation as to what would be the final disposition of the ships. The question, therefore, as to whether they were merely requisitioned for use for which compensation would be made to the owners at the close of the war or whether the act was intended to be confiscatory, was left open for future determination. In the meantime, the injured vessels were repaired as rapidly as possible and were employed by the government as naval auxiliaries, transports, and the like.

§ 116. **The Right of Confiscation.** The question as to the right of the government to confiscate the German ships and whether in any event they should be confiscated as an act of war was widely discussed, and public opinion in the United States was divided on the subject. The President gave assurances to the German government through a public announcement that "the government of the United States will in no circumstances take advantage of a state of war to take possession of property to which international understandings and the recognized law of the land give it no just claim or title. It will scrupulously respect all private rights alike of its own citizens and of the subjects of foreign States." Those who advocated the policy of confiscation argued that the United States government was not

<sup>1</sup> Cf. the *Official Bulletin* for December 31, 1917.

<sup>2</sup> Text in *Supp. Amer. Jour. of Int. Law*, October, 1917, p. 166.

a party to the above-mentioned Hague convention, and that even if it were, the convention was not binding owing to the failure of several of the other belligerents to ratify it in accordance with the general participation clause. Again it was argued that even if it were binding, its provisions did not apply to the larger number of German vessels, because their construction showed that they were intended for conversion into war ships and were therefore expressly excluded from the benefit of the convention. They were constructed under contract with the German government with a view to their use as naval auxiliaries in the event of war; they were furnished with gun platforms and steering gear below the water line and were manned by naval reserve crews who were on leave from the German navy and were subject to the orders of the Imperial government in case of war, evidence of which was shown by their compliance with the instructions of the German government to destroy the machinery and render the vessels unseaworthy. Thus while legally private property, they were potentially vessels of war, were subject to the orders of the German government, and were not at all within the exclusive control of their owners. The German government itself had in fact put forward this argument in the case of the *Lusitania* which, it claimed, was a naval auxiliary ship. Again it was argued that while having sought asylum in American ports in order to escape capture or destruction and having enjoyed the hospitality and protection of the United States for more than two years and a half, the German ships had abused that hospitality, if indeed they had not actually forfeited their immunity by unneutral conduct. They had become centres of plots against the peace and neutrality of the United States, and their masters had obeyed orders from their own government to destroy the machinery of the vessels and even to sink them in American harbors, thus endangering the safety of navigation.<sup>1</sup>

On account of these circumstances their status was wholly different from that of German ships suddenly caught in a belligerent port at the outbreak of war, such for example as those found in British ports on August 4, 1914. The considera-

<sup>1</sup> Some of these arguments were advanced by Professor A. B. Hart in the *New York Times* of April 1, 1917; by Sumner Nyrick, *ibid.*, May 1, 1917, and by Professor E. E. Stowell and A. R. Watson, *New York Times*, February 4, 1917.

tions which make it desirable on grounds of public policy and justice to allow the innocent owners of peaceful merchant ships in the latter case a period of time to withdraw their vessels and return to their home ports did not exist in the former case. In fact, however, German ships in American ports were free to depart at any time up to the outbreak of the war, but for obvious reasons they did not choose to avail themselves of the privilege. Had the American government allowed a *délai de faveur* after the declaration of war, it could not, owing to the disabling of the vessels by their officers and crews, have been availed of, and if it could have been, it would have resulted in their almost certain capture or destruction by British and French cruisers which lay in wait outside the territorial waters of the United States. Moreover, if any of them had succeeded in escaping, they would have either sunk themselves, thus depriving the American government of its right of requisition, or would have engaged in hostilities against the United States. The failure of the American government, therefore, to offer a *délai de faveur* after the outbreak of war with Germany can hardly be regarded as a just cause for reproach.

Finally, it was contended by some that the American government would have been justified in confiscating at least a number of German ships as an equivalent for American vessels illegally destroyed by German submarines.

In opposition to these arguments it may be said, in the first place, that the plea in avoidance of the obligations of the Hague convention was a technical argument. It was well known that the American government had always stood for the immunity of private property from capture at sea and that it had refused to ratify the above-mentioned Hague convention, not because it was opposed to the privileges which the convention granted to merchant vessels in enemy ports at the outbreak of the war as well as to those encountered on the high seas bound for enemy ports in ignorance of the existence of hostilities, but because the convention was not liberal enough in its treatment of ships of the latter class. As to the argument that the convention was not binding because not all of the belligerents had ratified it, that too was a technical plea, for in fact Germany and the other belligerents were proceeding on the theory that the unratified conventions were binding, notwithstanding this



circumstance.<sup>1</sup> The strongest argument of all — namely that the larger number of German vessels were not entitled to the benefit of the Hague convention even if its binding force were admitted, because they were constructed with a view to their conversion into war ships — would, if the rule were strictly construed, defeat the object of the convention, because, as Herr Kriege pointed out at the Second Hague Conference, practically no liners were being constructed today which were not capable of being converted into vessels of war.<sup>2</sup>

The governments of China, Cuba, Uruguay, and Siam followed the example of the United States and seized all German merchant vessels lying in their ports when they declared war against Germany.<sup>3</sup> Those seized in the ports of Cuba were turned over to the United States to be used in the prosecution of the war against Germany. The question of their ultimate disposition was not definitely determined until the close of the war.

§ 117. **Decision of the Peace Conference regarding the German Ships.** As stated above, the ultimate disposition of the German merchant ships seized in enemy ports at the out-

<sup>1</sup> See the cases of the *Möwe* and the *Fenix* cited above.

<sup>2</sup> It was argued by German sympathizers in the United States that the German ships were protected against confiscation by the treaty of 1828 between Prussia and the United States; but a study of the treaty shows that it was designed to protect merchants and had no application to ships of either party in the ports of the other. Cf. an article by Professor A. B. Hart in the *New York Times* of April 1, 1917. Somewhat inconsistently the German jurists denied the binding effect of the Belgian neutralization treaty of 1839, because only Prussia and not the Empire was a party; yet they affirmed the validity of the treaty of 1828 between Prussia and the United States, and the German government invoked its provisions in the *Frye* and *Appam* cases.

<sup>3</sup> Five vessels were seized in the ports of Cuba and twenty in those of Siam and vessels aggregating 40,000 tons in the ports of China. The prize court of Siam went to the length of condemning twenty German ships which had taken refuge in the port of Bangkok at the outbreak of the European war. It was clear from the language of the preamble, said the court, that it was not the purpose of the Hague convention to protect all merchant vessels without distinction found in enemy ports at the outbreak of war, but only those which were caught there by surprise while engaged in commercial operations. Ships entering for the purpose of refuge against capture did not belong to the latter class. In the second place, the court called attention to an official notice which the Siamese government had received from Germany denying that the eleventh Hague convention was binding for the reason that it had not been ratified by all the belligerents. If this were true, convention VI was not binding and therefore Germany was not entitled to invoke its provisions. Texts of the decisions in 45 *Clunet*, p. 1316; and 46 *ibid.*, 428.

break of the war and which had not already been condemned by the prize courts was left to the decision of the peace conference. The treaty of peace bound Germany to recognize the right of the allied and associated powers to the replacement of all merchant ships and fishing boats lost or damaged owing to the war; compelled her to cede to them all German merchant vessels of 1600 tons gross and upwards; and required her to waive "all claims of any description against the allied and associated governments and their nationals in respect of the detention, employment, loss or damage of any German ships or boats."<sup>1</sup> The aggregate German tonnage thus confiscated and awarded to the leading allied powers is said to have been 480,000 tons to Great Britain, 450,000 tons to France, 200,000 tons to Brazil, and 650,000 tons (89 vessels) to the United States. The total American tonnage destroyed by the Germans was placed at approximately 300,000 tons.<sup>2</sup> Regarding the justice of the decision reached by the peace conference as to the final disposition of the German ships it would seem that the general principle was incontestable. Not all the enemy merchant vessels sunk by the Germans were illegally destroyed; but a large number were undoubtedly so destroyed and this, taken in connection with the drowning of thousands of non-combatants who were travelling on such vessels, would seem to constitute a just ground for compensation. So far as the losses were the result of illegal methods of destruction, it was right that Germany should have been required to make compensation in so far as compensation was possible, and the appropriation of her merchant shipping which fell into the hands of her enemies was not unjust in principle.

§ 118. **Right of Belligerents to Requisition Neutral Ships.** May a belligerent requisition on payment of compensation neutral vessels which may happen to be within his jurisdiction, whenever in his judgment they are imperatively needed for public purposes? So far as enemy merchant vessels which are found in his ports at the outbreak of war are concerned,

<sup>1</sup> Part VIII, Annex III, pars. 1 and 7.

<sup>2</sup> According to the press reports the British government insisted that the German ships seized by the several allied powers should be placed in a common pool and allotted among them on the basis of their actual losses, but this proposal was opposed by the United States, which insisted on retaining all vessels seized in its own ports. *New York Times*, May 27, 1919.

this right is expressly recognized by article 2 of the sixth Hague convention. The question of the right to requisition neutral vessels was presented to the British prize court in the case of the *Zamora*.<sup>1</sup> An order in council of April 29, 1915, had been issued authorizing the crown to requisition upon compensation neutral ships and goods, in respect of which no formal decree of condemnation had been made by the prize court. The order in council was attacked by the claimants as *ultra vires* because inconsistent with the rules of international law. As to the general right of a belligerent to requisition neutral ships for military or naval uses, counsel for the claimants argued that international law allowed the requisition of neutral property only in a few exceptional cases. True, a right of angary had been asserted in some instances in the past, but it had always been limited to ships within the jurisdiction of the country exercising the right and then only for purposes of transport. Likewise military commanders in the field had sometimes claimed the right to seize neutral goods, but only in case of urgent military necessity, as, for example, the seizure of British ships in the Seine during the Franco-Prussian war in 1870.<sup>2</sup> "It was inconceivable," counsel concluded, "that such a right as that claimed by the crown in this case ever existed in international law. . . . There is not a single decision of the prize court of this country," they added, "in which such a right is hinted at and there is no justification for the application. . . .

<sup>1</sup> Trehern, *British and Colonial Prize Cases*, Vol. I, p. 309.

<sup>2</sup> The text writers on the subject may be divided into two categories: (1) those who confine the doctrine of angary to ships or vehicles, and (2) those who extend it to neutral property generally.

Oppenheim (II, 394) says the practice of angary arose in the middle ages and was made much use of by Louis XIV of France. To save the vessels of their subjects from seizure under the right of angary, States began in the seventeenth century to conclude treaties by which they renounced such right with regard to each other's vessels. Although the practice fell into desuetude during the eighteenth century, many writers assert that it is not obsolete and might be exercised today. Oppenheim doubts, however, whether the powers would concede to one another the exercise of such a right. The fact, he adds, that no case happened in the nineteenth century and that international law with regard to the rights and duties of neutrals has become much more developed would seem to justify the opinion that the *jus angariae* is now obsolete. Lawrence (p. 627) adopts essentially the same view. The Institute of International Law at its meeting in 1898 declared it abolished so far as it applied to neutral ships (*Annuaire*, p. 272), but the right was recognized by the U. S. Naval War Code of 1900 (Art. 6). Cf. also De Martens, *Précis*, § 269; Halleck (Baker's ed.), p. 485, and Dana's *Wheaton*, p. 373.

And even assuming that the right of angary exists, no text writer has suggested that it applies to a case like the present one where no urgent military necessity exists."

Sir Samuel Evans in rendering judgment in the case expressed the opinion, however, that a belligerent may take by requisition not only neutral ships but other property upon compensation, and he cited many instances where in former wars such things as planks, sail charts, pitch, hemp, copper sheets, and foodstuffs belonging to neutrals had been handed over to the government pursuant to an order or declaration of the crown. As to the right of a belligerent government to requisition such goods while still in the custody of the prize court and before a final decree of condemnation had issued, there was an abundance of judicial precedent.

Upon appeal, however, the privy council overruled Sir Samuel Evans' decision on the latter point. The primary duty of the prize court (as indeed of all courts having the custody of property the subject of litigation), said their lordships, "is to preserve the *res* for delivery to the persons who ultimately establish their title."

After a lengthy consideration of the whole question the privy council came to the following conclusion:

"A belligerent power has by international law the right to requisition vessels or goods in the custody of its prize court pending a decision of the question whether they should be condemned or released, but such right is subject to certain limitations. First, the vessel or goods in question must be urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security. Secondly, there must be a real question to be tried, so that it would be improper to order an immediate release. And, thirdly, the right must be enforced by application to the prize court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable."<sup>1</sup>

§ 119. Requisition by the United States and Great Britain of Dutch Merchant Vessels. In January, 1918, a temporary agreement was entered into between the American and Dutch governments under which the latter agreed to place at the disposition of the government of the United States a certain number of Dutch merchant vessels then lying idle in American ports because of the refusal of the American government to issue

<sup>1</sup> Trehern, *Cases*, II, 26.

licenses to them to depart with their cargoes, this because there was reason to believe that a portion of their cargoes would ultimately find their way to Germany. Under the arrangement the American government agreed to permit certain quantities of food, said to be needed by the people of Holland, to be shipped to the Netherlands, in return for which a certain number of Dutch vessels would be placed at the disposal of the United States for the transportation of food and other supplies for the Belgian relief commission and for the people of Switzerland.

In consequence, however, of the refusal of the German government to promise immunity to such vessels the Dutch government declined to carry out the terms of the agreement.<sup>1</sup> Thereupon the President of the United States, by a proclamation of March 20, 1918, issued in pursuance of authority conferred by an Act of Congress of June 15, 1917, "in accordance with international law and practice" and in virtue of his powers as commander-in-chief of the army and navy, authorized the secretary of the navy to take over on behalf of the United States the possession of and to employ all such vessels of Netherlands registry lying within the territorial waters of the United States as might "be necessary for essential purposes connected with the prosecution of the war against the Imperial German government."

About the same time a number of Dutch vessels were taken over by the British government, the aggregate tonnage requisitioned by the two governments amounting approximately to 1,000,000 tons.

The "imperative military needs" of the United States, said the President in his proclamation, "required the immediate utilization of such vessels," and he added that "full compensation" would be made to the owners "in accordance with the principles of international law" and that "suitable provision would be made to meet the possibility of ships being lost through enemy action."<sup>2</sup> Mr. Balfour defended the British seizures on the ancient right of angary which he said was not obsolete and upon the general right of sovereignty over all persons and property within British jurisdiction and he gave similar assurances

<sup>1</sup> As to the details cf. Scott, 12 *Amer. Jour. of Int. Law*, pp. 340 ff. Cf. also United States *Official Bulletin* of March 21 and April 12, 1918.

<sup>2</sup> Text in Supp. to 12 *Amer. Jour. of Int. Law*, p. 259.

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to those of President Wilson in regard to compensation and restoration of the vessels. The Dutch government formally protested against the action of the American and British governments as being in violation of the traditional friendship between the Netherlands on the one hand and the two requisitioning powers on the other and contrary to the ideals of right and justice, although it appears not to have contested the legality of the act of requisition. The American secretary of state returned a reply to the Dutch protest in which he asserted that the legal right of the United States was so well founded as to render unnecessary the citation of precedent and authority; he denied that the threatened action of Germany had anything to do with the refusal of the Dutch government to carry out its agreement to place a certain number of its vessels at the service of the United States and pointed out that the President had refrained for months after the outbreak of war from exercising his legal right to requisition the Dutch ships, in the hope of reaching a satisfactory agreement with the Dutch government. Finally, he added, the Dutch government still had left available ample tonnage for its own needs; shipping for these needs would not be detained in the United States; bunkering facilities would be afforded; adequate compensation would be paid the owners for the use of their ships requisitioned; those lost would be replaced, and a specified quantity of food and other necessities would be furnished to the people of Holland.<sup>1</sup> The British government returned a somewhat similar reply and again reaffirmed its earlier contention that the seizures were entirely within the sovereign rights of the British Empire.<sup>2</sup> It would seem that if the right of requisition is allowable at all under international law, the manner in which it was exercised by the United States and Great Britain in this case was not objectionable.<sup>3</sup>

§ 120. The Right of Neutrals to Requisition Belligerent Vessels in Their Ports. Action of Italy, Portugal, and Brazil. The right of a *belligerent* to requisition upon payment of com-

<sup>1</sup> See 12 *Amer. Jour. of Int. Law*, p. 352.

<sup>2</sup> *British State Papers, Misc.* (1918), No. 5.

<sup>3</sup> The right of requisition in such cases has been defended by high Dutch authority. Cf. for example General den Beer Poortugael's *Het Internationaal Maritiem Recht*, pp. 413 ff., from which various quotations are made by Scott in 12 *Amer. Jour. of Int. Law*, p. 353. But it is denied by the Dutch writer De Louter. See his *Het Stellig Volkenrecht*, Vol. II, p. 412.

compensation merchant vessels, whether enemy or neutral, found in his ports at the outbreak of war is well established by authority and practice. May a *neutral* government exercise a similar right in respect to the merchant vessels of a belligerent that have taken refuge in its ports to avoid capture by the enemy? This question was raised during the recent war by the action of the governments of Portugal, Italy, and Brazil in requisitioning German merchant vessels lying in their ports, while those countries were still officially at peace with Germany,<sup>1</sup> although in the case of Italy and Germany diplomatic relations had been broken off. The German government does not appear to have protested against the Italian seizures, but an ultimatum was addressed to the Portuguese government demanding the restoration within forty-eight hours of the ships seized by it, and when the Portuguese government refused to comply with the demand, Germany declared war against Portugal. The German government regarded the seizure as a breach of neutrality and a violation of treaty stipulations between the two countries, in that the Portuguese government did not come to an agreement with the owners, in advance, as to the amount of compensation to be paid for the use of the ships. Again the German government charged that the purpose for which the seizures were made was not such as was contemplated by the treaty or by the general rules of international law governing the right of requisition.

The Portuguese government defended the seizure on the general principle of international law which allows a State to requisition for public use in case of emergency the property of any individual, whether citizen or alien, found within its jurisdiction, provided it makes compensation to the owners, and this the Portuguese government had solemnly agreed to do. In short, it had done nothing more than to exercise the right of

<sup>1</sup> Of the thirty-seven German ships in Italian ports thirty-four were requisitioned by the Italian government in November, 1915, some months before the outbreak of war between the two countries, provision being made for monthly compensation to the owners, 23 *Rev. Gén.*, 191, and 24 *ibid.*, 351. According to the press despatches they were seized for use in the Italian merchant marine or for naval auxiliaries. All Austrian ships, some twenty-one in number, were similarly seized. (Clunet, 1915, p. 302.) But Italy was already at war with Austria, and under article 2 of the sixth Hague convention the right of the Italian government to requisition Austrian merchant vessels was incontestable.



eminent domain in respect to the property seized, and this was an admitted inherent and sovereign right of all States. Moreover, the Portuguese government relied on article 2 of a treaty of commerce and navigation concluded between the two countries on November 30, 1908, which declared that ships as well as all other merchandise or property belonging to either party, found in the territory of the other, might be requisitioned for public use upon compensation previously agreed upon between the parties concerned. The only question, therefore, that could be raised was whether Portugal had exercised the right thus recognized in accordance with the procedure set forth in the treaty. As stated above, the German government denied that the commercial needs of Portugal were such as to require the requisition of so large a number of German ships and asserted that the real purpose of the seizure was to place the vessels at the disposition of Great Britain with whom the Portuguese government was in alliance, although at the time it was officially neutral.<sup>1</sup> In the second place, the German government complained that the ships had been taken over by the Portuguese government before coming to an agreement with the owners in regard to the amount of the compensation to be paid, as was required by the treaty of 1908. To these complaints the Portuguese government replied that the number of ships seized was no greater than the urgent needs of its commercial marine and that they had been requisitioned without previous agreement with the owners because of the difficulty of negotiation and the necessity of immediate action, since the delays which such negotiations would have entailed would have given the crews an

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The number of German ships seized by Portugal (decree of February 23, 1916) was reported to have been seventy-two. They were subsequently chartered to the British government on a rental basis of \$7,000,000 per year.

In May, 1917, after having revoked its proclamation of neutrality issued at the outbreak of the war in Europe, the Brazilian government seized forty-two German merchant vessels which had taken refuge in the ports of Brazil. 45 *Clunet*, 166. Apparently there was no intention to confiscate the ships but only to requisition them for use in the coasting trade of Brazil. After the entrance of Brazil into the war against Germany many of the ships thus seized were leased to the French government (November, 1917). As in the United States the question of their ultimate disposition was not then determined.

<sup>1</sup> Sir Edward Grey asserted in the House of Commons on March 14, 1916, that in fact Portugal, in view of her ancient alliance with Great Britain, was not strictly a neutral power.

opportunity to sink the vessels or render them unseaworthy, as was done by the crews of German ships in American ports. To exercise effectively the right of requisition, therefore, it was necessary to take immediate possession of the ships. Assurances of compensation had been given, and under the circumstances the German government had no just ground for complaint. Finally, the Portuguese government contended that the rules of procedure laid down in the treaty of 1908 regarding the requisition of ships applied only to those *in transitu* and not to those which had taken asylum in neutral ports to avoid capture.<sup>1</sup> Requisition of vessels in the latter situation was governed, therefore, by the general principles of international law, which do not require previous agreement between the parties in respect to the amount of compensation.<sup>2</sup>

Regarding the general question of the right of a State to seize for a public purpose the property of foreigners situated within its territorial limits there is a difference of opinion among the authorities. Those who uphold it rely mainly upon the ancient *droit d'angarie* which allows a belligerent State to use or even to destroy, when necessary, neutral property found within its territory. A well-known instance of the exercise of this right occurred during the Franco-Prussian war of 1870-1871 when the Germans seized for military use between six and seven hundred Swiss railway carriages in Alsace, and during the same war a number of English vessels were sunk by a German commander in the Seine at Duclair to prevent French gun-boats from passing up the river.<sup>3</sup> The Hague convention of 1907

<sup>1</sup> Various German newspapers regarded this circumstance as a special reason why the German ships should not have been seized. They were, it was argued, in Portuguese ports as refugees against capture by the enemy, and it was therefore a violation of the right of asylum to requisition them. But as Professor Basdevant remarks, it is a singular interpretation of the theory of asylum to deduce from it the immunity of a ship from the jurisdiction of the local sovereign.

<sup>2</sup> The various questions at issue are discussed by Professor Basdevant in a learned article entitled *La Réquisition des Navires Allemands* in 23 *Rev. Gén. de Droit Int. Pub.* (1917), pp. 268 ff. Cf. also Ferrand, *Des Réquisitions* (1917), pp. 341-343, and Harley, "The Law of Angary," 13 *Amer. Jour. of Int. Law*, p. 295.

<sup>3</sup> Hall, *International Law*, 6th ed., p. 742, and Calvo, *Le Droit Int.*, Vol. IV, § 2245. De Martens (*Précis*, § 269) doubts whether under the common law of nations a belligerent may, except in cases of extreme necessity, requisition neutral vessels lying in his ports at the outbreak of war to meet the requirements of his merchant marine. Kleen (*Lois et Usages de la Neutralité*, Vol. II, pp. 68 ff.)

respecting the rights and duties of neutral powers and persons allows belligerents to seize and use neutral railway material in case of necessity, upon condition of compensation and restoration. (Art. 19.)

From this right of a belligerent to requisition and use neutral property the converse proposition is deducible, namely, that a neutral has an equal right to seize and use in case of necessity the property of a belligerent found within his territory. It would seem to be a sound and just principle that if such a right be conceded to belligerents, it should be equally conceded to neutrals whose need for merchant ships during a world war may be as urgent and imperative for the maintenance of their economic life as the military necessities of belligerents. The conclusion, therefore, must be that Portugal was within her legal rights in requisitioning the idle German ships lying in her ports, although there is of course ground for a difference of opinion as to whether her procedure was strictly in accord with her treaty with Germany.<sup>1</sup>

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apparently also questions the right of a belligerent to requisition neutral ships. The right is also denied by Hautefeuille, Klüber, Lawrence, Merignhac, Neumann, Pradier-Fodéré, De Louter and De Boeck. Phillimore (*International Law*, Vol. III, § 29), Heffter (*Le Droit Int. de l'Europe*, § 150), Bluntschli (*Droit Int. Cod.*, § 795, *bis*), Spaight, Higgins, Wehberg and Perels recognize the right with more or less reservation. Azuni (*Droit Maritime*, ch. III, art. 5) and Albrecht, who examines the question exhaustively (*Requisitionen von neutralem Privateigentum insbesondere von Schiffen, Zeitschrift für Völkerrecht und Bundesstaatsrecht*, 1912, p. 31), however, regard it as a right which may be exercised in all cases of public utility, and they assert that a vessel which attempts to escape the exercise of such a right over it may be confiscated. The right has also been established in many cases by treaty. Cf. the interesting discussion of the subject at the meeting of the Institute of International Law in 1898 and article 39 of its *règlement* on the legal status of ships and their crews in foreign ports. *Annuaire*, Vol. 17, pp. 57, 63, 255, and 284.

<sup>1</sup> Professor Basdevant, who has examined the question fully and without evidence of bias, reaches the conclusion that the conduct of the Portuguese government was not open to just reproach. Article cited, p. 276.

## CHAPTER VII

### TRANSFER OF MERCHANT VESSELS FROM BELLIGERENT TO NEUTRAL FLAGS

§ 121. Transfers before the Outbreak of War; the Cases of the *Tommi* and the *Rotherstand*; § 122. The Case of the *Bellas*; § 123. The Case of the *Colonia*; § 124. Transfer of American-owned Vessels from German to American Registry after the Outbreak of the War; § 125. The Case of the *Dacia*; § 126. The French Rule; § 127. The American View and Practice; § 128. British Authority and Practice; § 129. Views Expressed at the London Naval Conference of 1908-1909; § 130. Rules Adopted by the Conference; § 131. What Rule to be Applied? § 132. Decision of the French Council of Prizes; § 133. Observations on the *Dacia* Decision; § 134. Abrogation of Article 57 of the Declaration of London; § 135. Seizure of German-owned Ships under Neutral Flags; § 136. German Law and Practice; § 137. Question Raised by the American Ship-purchase Bill in 1915; § 138. Controversy between Chili and Great Britain; § 139. Transfer of War Ships from Belligerent to Neutral Flags; § 140. Sale of Enemy Cargo to a Neutral in Anticipation of War.

§ 121. Transfers before the Outbreak of War; the Cases of the *Tommi* and the *Rotherstand*. In the cases of the *Tommi* and the *Rotherstand*<sup>1</sup> the question of the legality of the transfer of two vessels, owned by a German company, to British registry immediately before the outbreak of war between Great Britain and Germany was presented to the British prize court in October, 1914. Both vessels were sold by their owners by telegram to a British company on August 1, 1914, three days before the outbreak of war between Great Britain and Germany, while they were still at sea. Both were seized on August 5 while in British ports. On behalf of the crown it was contended that the vessels were flying the German flag when captured, and this was conclusive as to their enemy character; that the alleged transfer was invalid because there was no bill of sale on board; that since all the shareholders were German, the ships were not entitled to British registry; that the onus of proving that the transfers were *bona fide* and absolute was on the claimants, and no such proof had been produced; that the sale was probably made in expectation of a European war involving Great Britain,

<sup>1</sup> Trehern, *British and Colonial Prize Cases*, Vol. I, pp. 16 ff.

and that it was bad because the interest of the vendor, the German company, which controlled the vendee, the English company, had been preserved. The claimants, on the other hand, contended that the sale was *bona fide* and absolute, as was shown by the documents, and was made for the purpose of withdrawing the ships from the Baltic Sea, and thereby to protect them from seizure by Russia in case of war with Germany;<sup>1</sup> they cited the cases of the *Ariel* (1857) and the *Baltica* (1858) in favor of the validity of the transaction; they contended that the rule as to the conclusiveness of enemy character from the flag did not apply to ships in port (the *Vigilantia*, 1798, and the *Success*, 1812); that the claimants had by their purchase of the vessels kept them from being recalled to Germany and thereby from being used against Great Britain, and that the transfers had not been made in expectation of war between Great Britain and Germany, for until August 4 it was not expected even in Germany that Great Britain would be involved in the war, as evidence of which Sir Edward Goschen's despatch of August 8 was quoted.

Sir Samuel Evans, president of the British prize court, after reviewing at length the facts and circumstances of the sale, stated that it was not necessary for the purpose of deciding the case to show that the transfer was made in expectation of war between Great Britain and Germany. The question was whether or not such a transfer could be made so as to defeat the right of belligerents at that time. That, he said, was the real test. After adverting to the fact that the vessels were flying the German flag at the time of the seizure, he disposed of the contention of the claimants that the conclusiveness of enemy character to be drawn therefrom applied only when capture is made at sea, and not when it is effected in port, by saying that it mattered not in the slightest degree whether the flag the vessels were entitled to fly was actually flying or not. The question was, what was the flag they were *entitled* to fly; and he thought no distinction of this kind was to be made between a ship captured at sea and a ship seized in port. The flag which the *Tommi* and the *Rotherstand* were entitled to fly at the time of their seizure was the German flag, and they could not at that time, if they ever could during the war, have had the right to

<sup>1</sup> Germany declared war against Russia on the very day of the sale.

fly the British flag. That was enough to make them proper subjects of seizure as prize.

Then turning to the question as to whether the transfers were *bona fide*, Sir Samuel concluded that they were not. The substance of the transaction was, he said, something like this: "We understand you over there and you understand us over here; our companies are mutually connected. We in Germany own nine-tenths of the shares in the British company; if war breaks out, whoever the belligerent is, let these ships be called British ships." That was not a sufficient transfer. It was therefore quite clear from the facts in the cases that the purpose of the transfer was to defeat the rights of belligerents when war, which was then imminent, became an actual fact, as it did a few hours afterwards. The conclusion was that the *Tommi* and *Rotherstand* were German ships at the time of seizure and that the transfers were invalid.<sup>1</sup>

§ 122. *The Case of the Bellas.* Another case of transfer before the outbreak of war was that of the *Bellas*,<sup>2</sup> a German bark seized in a Canadian port on August 5, 1914, the day after the outbreak of the war between Great Britain and Germany. The claimants alleged, *inter alia*, that the *Bellas* was not a German ship at the time of capture but a neutral vessel, having been transferred to a Portuguese subject on July 3, one month before the outbreak of war. The transfer was made on the Atlantic ocean during the course of a voyage from Oporto, Portugal, to Rimouski, Canada, and the ship only reached its destination four days before the outbreak of war. The exchequer court of Canada, before which the case was tried, held that the papers which the *Bellas* carried established that she was a German ship and that she was in fact flying the German flag. "None of the essentials to make a valid transfer had been alleged," and the claim of the Portuguese owner was dismissed with costs.

§ 123. *The Case of the Colonia.* In the case of the *Colonia*, the French *conseil des prises*, following the view of the British prize court in the cases of the *Tommi* and the *Rotherstand*, held

<sup>1</sup> They were not condemned, but like the *Chili* and various other German ships which were found in British ports at the outbreak of war, were in pursuance of the Hague convention ordered to be detained until the end of the war.

<sup>2</sup> Trehern, *op. cit.*, Vol. I, p. 95.

that the sale of an enemy merchant vessel to an ally of France before the outbreak of war was subject to the same rules as those which apply to transfers to neutral registry.

The *Colonia* was a merchant vessel owned by a German subject and navigating under the German flag. On July 31, 1914, three days before the declaration of war by Germany against France, it was sold to a British steamship company, and on August 24, some days after the outbreak of war, during the course of a voyage from a port in Spain to Bordeaux, the actual transfer to the British flag took place. On October 12 the ship was captured by a French cruiser. The council of prizes held that the transfer was made with the sole view to elude the consequences of capture and that the ship must be condemned under the terms of article 7 of the prize *réglement* of July 26, 1778, which provides that the transfer to a neutral flag of an enemy merchant ship after the outbreak of war, unless it be established that the transfer was not made with a view to escaping capture, shall be considered as creating an absolute presumption of nullity if the transfer takes place during the course of the voyage. This rule, it was added, was substantially in accordance with article 56 of the Declaration of London. There was no reason, it was said, for the application of a different rule in the case of a transfer to the flag of an allied power or even to the French flag.<sup>1</sup>

§ 124. **Transfer of American-owned Vessels from German to American Registry after the Outbreak of War.** The transfer to American registry of several German vessels after the outbreak of the war in Europe raised the question of the validity of transfers during war.<sup>2</sup> Among those so transferred were the *Brindilla*, the *Platuria*, and the *Petrolite*, which at the outbreak of the war were under German registry. They were subsequently seized by British cruisers, but were released on the orders of the British government, apparently because, although transferred

<sup>1</sup> Text of the decision in 22 *Rev. Gén. de Droit Int. Pub.* (1915), *Jurisprudence*, pp. 45-47.

<sup>2</sup> By an act of Congress of August 24, 1912, the admission of foreign-built merchant vessels to American registry was authorized, provided they were American-owned and not over five years old. The Act of August 18, 1914, removed the limitation as to the age of vessels which might be transferred. Between July 1, 1914, and February 28, 1917, 204 vessels were transferred from foreign flags to American registry.



from the German flag, they were and had always been owned by American citizens. Their transfer from an enemy to a neutral flag had not involved any change of ownership, and consequently the British government did not contest the validity of the transfers.

§ 125. *The Case of the Dacia.* In the case of the *Dacia* a somewhat different question was involved. This vessel was purchased by an American citizen from the Hamburg-American line, after the outbreak of the war, while it was lying in an American port, and it was admitted to American registry in pursuance of the Emergency Act of August 18, 1914.<sup>1</sup> Unlike the cases mentioned in the preceding section, the transaction in this case involved a change of ownership as well as a change of nationality. It involved the question as to the right of a citizen of a neutral country to purchase, after the outbreak of hostilities, merchant vessels not only flying a belligerent flag, but owned by a company of belligerent nationality, and to transfer them to neutral registry. The steamer was subsequently laden with cotton intended to be shipped to Germany, and the American government insured the cargo in pursuance of the Emergency War Risk Insurance Act passed by Congress in September, 1914, although it declined to insure the vessel. The American government requested an assurance from the British government that the *Dacia* would be allowed to carry its cargo to Rotterdam without molestation; but not being willing to admit the legality of the transfer and not wishing to waive its rights in the premises, the British government declined to give the assurance and announced that the vessel would, if captured, be put in the custody of a prize court, in order that the validity of the transfer might be judicially determined.<sup>2</sup> The

<sup>1</sup> The bill of sale was dated December 6, 1914.

<sup>2</sup> In April, 1915, the British government in a note to the American government had announced that it would contest the validity of the transfer of German and Austrian merchant vessels to American ownership since the beginning of the war, and that it would contest the validity of transfers of American-owned merchant vessels from foreign registry to the American flag if such vessels appeared to be trading with Germany, Austria-Hungary, or Turkey, either directly or through the ports of neutral countries. Masters of American-owned vessels transferred from foreign to American registry were advised to carry a United States certificate attesting the validity of the transfer, although the certificate would not protect the vessels from seizure and prize court proceedings, if evidence of trading with the enemies of Great Britain, either directly or indirectly, were disclosed.

French government went further and filed with the department of state a communication in which it notified the government of the United States that it would decline to recognize the transfer to American registry of any German vessels purchased by citizens of the United States. In February, 1915, the *Dacia* was seized by a French cruiser while en route to Rotterdam and was taken into Brest, where it was placed in the custody of the French prize council.

§ 126. **The French Rule.** American and English practice in the past had recognized the validity of such transfers after the outbreak of war, provided they were *bona fide* and not merely colorable; but the French and Russian rule had been otherwise. The French rule is an old one and is found in the prize regulations of 1704 and 1778,<sup>1</sup> which declare that no vessel of enemy construction or which had been at any time owned by an enemy should be reputed neutral without proof that the sale to the neutral was made before the commencement of hostilities.

At the international naval conference of 1908-1909, the Austro-Hungarian memorandum referred to the French rule as "an exaggerated restriction upon neutral commerce since this commerce ought to be free even in time of war," and declared that it had been disregarded by the French during the war of 1870.<sup>2</sup> Kleen, a Swedish publicist of renown, describes the old French rule as "superannuated" and out of harmony with the principle that every ship navigating of right under a neutral flag and with papers in due form must be respected.<sup>3</sup> In fact, the French delegation at the London Conference signed the Declaration, which recognizes the validity under certain conditions of transfers made during war, and the French prize regulations promulgated December 19, 1912, put the new rule into force, and they were reissued at the outbreak of the recent war.

§ 127. **The American View and Practice.** At the commencement of the Crimean war, in which Russia and France were belligerents, various Russian merchant vessels were purchased by neutrals and transferred to the registries of their countries. The French government took the position that all such vessels

<sup>1</sup> For a discussion of the French rule cf. Dupuis, *Le Droit de la Guerre Maritime*, §§ 96 and 97.

<sup>2</sup> *Proceedings International Naval Conference, House of Commons Sessional Papers, Misc.*, No. 5 (1909), p. 112.

<sup>3</sup> *Lois et Usages de la Neutralité*, Vol. II, p. 89.

as were transferred after the declaration of war were still liable to capture by French cruisers.<sup>1</sup> One of these, the *St. Harlampy*, was purchased by an American citizen. Secretary of state Marcy, in a letter to the American minister at Paris, Mr. Mason, contested the French claim that such transfers were invalid, saying: "It is difficult to conceive how the purchase of merchant vessels can come within the restriction of contraband, which is the only one imposed on neutrals during war." The right of neutrals to purchase ships, he went on to argue, was a right recognized by the law of nations and could not be taken away by municipal legislation.<sup>2</sup> He also quoted Hautefeuille's opinion as an answer to the French contention. This author says: "It is impossible to recognize such a right as that claimed by the regulation of France."<sup>3</sup>

Mr. Marcy's view was confirmed by secretary Cass in 1859, by secretary of the treasury Boutwell in 1871, by secretary Fish in 1877, by secretary Evarts in 1879,<sup>4</sup> and by attorney-general Cushing in two opinions in 1854 and 1855.<sup>5</sup>

In substance this was the view of Justice Story,<sup>6</sup> Chancellor Kent,<sup>7</sup> and General Halleck.<sup>8</sup> The solicitor of the department of state, in a memorandum of August 7, 1914, thus stated the position of the United States on the question:

"A neutral has a perfect right to purchase the merchant vessels of belligerents during a state of war, when such purchase is *bona fide*, without defeasance, reservation of title or interest, and intended to convey perfect and permanent title to the purchaser."<sup>9</sup>

In practice the United States has proceeded on this view of neutral rights. During the civil war more than six hundred vessels under American registry were transferred to neutral flags, notwithstanding that the obvious purpose of the transfers was to withdraw them from capture by Confederate

<sup>1</sup> De Pistoye et Duverdy, *Traité des Prises Maritimes*, T. II, pp. 1, 502.

<sup>2</sup> See his letter in Lawrence's *Wheaton*, 1863, pp. 581, 582, and Moore's *Digest*, Vol. VII, p. 416.

<sup>3</sup> *Droits des Nations Neutres*, T. III, tit. XI, ch. 2, § 1.

<sup>4</sup> Moore's *Digest*, Vol. VII, pp. 415-421.

<sup>5</sup> *Ops. Atlys. General*, 638 (1854), and 7, *ibid.*, 538 (1855).

<sup>6</sup> *Principles and Practices of Prize Courts* (Ed. by Pratt), pp. 63-65.

<sup>7</sup> *International Law* (ed. by Abdy), p. 236.

<sup>8</sup> *International Law*, Vol. II, p. 139.

<sup>9</sup> See the full text in the *Congressional Record*, August 11, 1914, pp. 14758-14759; also Senate Document 563, 63d Congress, 2d Sess.

cruisers.<sup>1</sup> The transfers were regarded by the Confederate authorities as valid.

During the war between Chili and Peru in 1879 many transfers from belligerent to neutral flags took place, the purchasers for the most part being American citizens.<sup>2</sup> Likewise, during the conflict between France and China in 1883, the number of Chinese vessels purchased by American citizens and transferred to American registry was so large that President Arthur in his annual message to Congress on December 1, 1884, referred to them as "a large trading fleet heretofore under the Chinese flag."<sup>3</sup> The validity of the transfers does not seem to have been questioned by the French government.

It is true that during the Spanish-American war the United States Supreme Court condemned the *Benito Estenger*,<sup>4</sup> a Spanish vessel which had been transferred to British registry, but it was on the ground that the transfer was not a *bona fide*, complete and unconditional transaction, as shown by the fact that no purchase money had passed, that the Spanish master and crew remained in charge of the ship, and that the vendor retained an interest in the vessel.

§ 128. **British Authority and Practice.** The American view of the right of neutrals to purchase belligerent vessels after the outbreak of war and to transfer them to neutral flags was that held by the British admiralty courts and the text writers on international law. Lord Stowell, in a series of cases, sustained the validity of such transfers whenever the sale was *bona fide*, complete, and unconditional. In the case of the *Sechs Geschwestern*, 1801,<sup>5</sup> after adverting to the French rule, he said:

"The rule which this country has been content to apply is that property so transferred must be *bona fide* and absolutely transferred; that there must be a sale divesting the enemy of all further interest in it; and that anything tending to continue his interest vitiates a contract of this description altogether. This is the rule which this country has always considered itself justified in enforcing; not forbidding the transfer as illegal, but prescribing such rules as reason and common sense suggest to guard against

<sup>1</sup> Marvin, *The American Merchant Marine*, p. 338.

<sup>2</sup> *Foreign Relations of the United States*, 1879, p. 896.

<sup>3</sup> Richardson, *Messages and Papers of the Presidents*, Vol. VIII, p. 236.

<sup>4</sup> 176 U. S. 568.

<sup>5</sup> 4 C. Robinson's *Admiralty Reports*, 100. Cf. also the cases of the *Jemmy* (1801), *ibid.*, p. 31, the *Omnibus* (1805), 6 *ibid.*, 71, the *Minerva*, *ibid.*, p. 399; the *Vrouw Margereta*, 1 C. Rob. 336, and the *Argo*, *ibid.*, p. 158.

collusion and cover, and to enable it to ascertain, as much as possible, that the enemy's title is absolutely and completely divested."

This view was reaffirmed by Dr. Lushington during the Crimean war in certain cases involving the validity of the transfers of Russian vessels to neutral flags. In the case of the *Merck*, decided in 1854, Dr. Lushington laid down the rule that neutral purchases of belligerent ships shortly before the commencement of the war or during the war were lawful transactions, provided there were clear and satisfactory proofs of the right and title of the neutral claimant and of entire divestment of all right and interest in the enemy vendor. But in all such cases, the onus of proof was held to be on the claimant.<sup>1</sup> In the case of the *Baltica*, a Russian merchant vessel, the owners, fearing that the ship would be captured by an English cruiser, transferred it to a neutral flag (Danish). Dr. Lushington condemned it, not because the sale was made for the purpose of avoiding the risk of capture, but for the reason that two-thirds of the purchase price was not paid in cash, but was to be paid out of the subsequent earnings of the vessel. Neither Dr. Lushington nor the privy council considered the motive of the vendor as having any bearing upon the legality of the transfer. The real test was the character of the transaction, not the motive of the vendor. Regarding it as a *bona fide* transaction, the privy council released the ship, notwithstanding the fact that the circumstances indicated that the purpose of the transfer was to avoid the risk of capture.<sup>2</sup>

In the case of the *Ariel* (1857) the same principle was reaffirmed by the privy council.<sup>3</sup>

The rule of the British admiralty courts that *bona fide* and completely perfected neutral purchases of belligerent merchant vessels during war are valid, is that also laid down in the British manual of naval prize law (1888).<sup>4</sup> Finally, the authority of

<sup>1</sup> Spinks, *English Prize Cases*, 98. On the practice of the English courts in such cases, cf. Lawrence's *Wheaton*, p. 583; Phillimore, *International Law*, Vol. III, *addenda*, p. xxxv; Wildman's *International Law*, Vol. II, pp. 88, 90.

<sup>2</sup> Moore's *Privy Council Cases*, p. 141 (1857).

<sup>3</sup> *Ibid.*, p. 128.

<sup>4</sup> "A vessel apparently owned by a neutral is not really so owned if acquired by a transfer from an enemy, or from a British or allied subject made at any time during the war, or previous to the war but in contemplation of its breaking out, unless there is satisfactory proof that the transfer was *bona fide* and complete" (Holland, par. 53, p. 17).

the English writers on international law is almost unanimously in favor of the validity of such transfers, when made under the conditions mentioned above. Hall, referring to the old French rule which forbids the sale of belligerent vessels to neutrals after the buyers could have had knowledge of the outbreak of war, remarks: "In England and the United States, on the contrary, the right of purchasing vessels is in principle admitted, they being in themselves legitimate objects of trade as fully as any other kind of merchandise."<sup>1</sup> Oppenheim remarks that there is no general rule governing the subject, but he adds,

"the rule ought to be that since commerce between belligerent subjects and neutral subjects is not at all prohibited through the outbreak of war, a *bona fide* sale of enemy property should have the effect of freeing such vessels from appropriation as they are in fact no longer enemy property."

The only exception to the rule which he recognizes is sales made *in transitu*.<sup>2</sup> Westlake adopts substantially the same view,<sup>3</sup> and so does Bentwich, who concludes, after a review of the cases, as follows:

"In effect then the present English rule is that the sale to a neutral may be made at any time or place, except a blockaded port, but to be good against the captor it must be complete, *bona fide*, and an out-and-out transfer, and if made in time of war the purchaser must have taken possession."<sup>4</sup>

Mr. A. Pearce Higgins, if one more high authority may be quoted, remarks that

"transfer to a neutral flag is not rendered invalid by English law merely because it was made during or in contemplation of hostilities, but the onus of proving that the transfer was genuine lies on the claimant."<sup>5</sup>

It will be seen from this review of the decisions of the British admiralty courts and the opinions of the English text writers covering a period of more than a hundred years that the judicial authority and practice of England had been unanimously in favor of the validity of sales made during and in contemplation of war, provided they were *bona fide* and fully completed trans-

<sup>1</sup> *International Law*, 6th ed., p. 499.

<sup>2</sup> *International Law*, Vol. II, p. 206.

<sup>3</sup> *International Law*, Part II, pp. 149, 150; cf. also the recently published *Collected Papers of John Westlake on Public International Law* (ed. by L. Oppenheim), p. 643.

<sup>4</sup> *The Declaration of London* (1911), p. 105.

<sup>5</sup> *War and the Private Citizen*, p. 31.

actions, and not merely colorable or fictitious transfers. In no instance, it appears, was it ever asserted that the motive of the vendor or the purpose of the sale should be regarded as a test of validity. In short, the essential condition of validity was to be found in the character of the transaction, and not in the motive underlying it.

§ 129. Views ~~Expressed~~ at the London Naval Conference of 1908-1909. This was the English law and practice down to the time of the assembling of the International Naval Conference at London in 1908. That the English government still held to this rule and desired to see it adopted by the Conference appears from the following instructions to its delegation:

"The point of difference between the powers on the question of the transfer to a neutral flag is, broadly, whether *bona fide* transfers after the outbreak of the war, or within a fixed period before the war, are or are not permissible. Some powers hold such transactions to be invalid. Great Britain, and several other powers, adopt the view that, subject to certain conditions, such transfer is legitimate, but it is for the purchaser to establish the *bona fides* of the transaction. A rule excluding altogether the right of transfer after the commencement of war appears to His Majesty's government to be too serious a burden to impose on any country which carries on a large trade in building and selling ships. The equity of the case seems to demand that transfer should be permissible, but that the belligerent should be entitled to inquire closely as to the *bona fides* of the transaction, and that the onus should be on those concerned therein to establish that the transfer was complete and the transaction genuine. His Majesty's government think that the British delegates should maintain this view at the conference." <sup>1</sup>

The views of other powers represented at the Conference were expressed in memoranda submitted by the delegations of each of them. Those submitted by Austria-Hungary, Japan, the Netherlands, and Spain accepted in substance the Anglo-American rule. The Italian memorandum submitted article 42 of the Italian maritime code, which declares that Italian nationality cannot be granted to a ship sold by a subject of a belligerent at peace with the king, but that the minister of marine might, if the fact of the sale is established, admit the ship to Italian registry.<sup>2</sup>

The memoranda of the delegations of France and Russia de-

<sup>1</sup> *Proceedings of the International Naval Conference, House of Commons Sessional Papers, Misc., No. 4 (1909), p. 31.*

<sup>2</sup> *Ibid.*, p. 45. At the beginning of the Turco-Italian war in 1912, two Turkish merchant vessels, the *Vasilios* and the *Aghios Gorghios*, were purchased by Greek



clared in favor of the old French rule that transfers made after the outbreak of war are absolutely invalid, whether *bona fide* or not.

The memorandum of the German delegation declared that a vessel bearing a neutral flag should be treated as an enemy ship if up to the opening of hostilities or within the two weeks preceding, it carried the enemy's flag.<sup>1</sup> This was substantially the same as the French rule.

Thus it appears that at the time of the assembling of the International Naval Conference the governments of three of the belligerents in the recent war, those of Great Britain, Austria-Hungary, and Japan, maintained the view that *bona fide* transfers from belligerent to neutral flags after the opening of hostilities were lawful transactions; while three others, those of France, Germany, and Russia, regarded them as invalid.

§ 130. Rules Adopted by the London Conference. During the course of the deliberations the German delegation stated that it would like to see the rule embodied in their memorandum adopted, that is to say, the rule of absolute invalidity of all transfers made after the opening of hostilities and during the two weeks preceding, but that in case the commission to which the subject had been assigned did not share this view, it wished to propose that transfers made after the outbreak of hostilities should be presumed as illicit.

The English delegation now abandoned the rule which it was instructed to maintain at the Conference, and which was English law at that time, and proposed a new rule. This new rule provided that transfers made after the outbreak of hostilities should be regarded as valid if it was proved that the transfer was *not made to evade the consequences to which an enemy vessel as such is exposed*. Thus the German and British delegates reached a common ground; both were prepared to

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subjects and admitted to Greek registry. They were subsequently seized by Italian cruisers and condemned by a prize court, not on the basis of the existing law in Italy but on the basis of article 56 of the Declaration of London. This decision has been strongly attacked in a brochure entitled "*Sulla illegittimità del Sequestro della Cattura dei Velieri Vasilios ed Aghios Gorghios*," on the ground that the Declaration of London, which derogates from the law of Italy and from a treaty between Italy and Greece, had never been ratified by the Italian government. Cf. the *Rev. Gén. de Droit Int. Pub.*, Vol. 20, p. 652. If the sale was *bona fide*, the condemnation was contrary to the English rule and practice.

<sup>1</sup> *Proceedings of the International Naval Conference, House of Commons Sessional Papers, Misc.*, No. 4 (1909), p. 2.

recognize that transfers made after the opening of hostilities should be considered lawful if the purpose was not to evade capture. This proposal was in substance adopted by the Conference and is embodied in article 56 of the Declaration, which declares that transfers effected after the outbreak of hostilities are void unless it is proved that they were not made in order to evade the consequences to which an enemy vessel as such is exposed. If the transfer is made during a voyage or in a blockaded port, or if the vendor reserves the right to repurchase the vessel, or if the registry laws of the country whose flag the vessel flies have not been complied with, there is an absolute presumption that the transfer is void. On the other hand, if the transfer is made while the vessel is in a neutral port, as was that of the *Dacia*, the presumption of invalidity is not absolute, but may be rebutted by proof to the contrary.<sup>1</sup> As has been said, the British prize courts in the past made the character of the transaction and not the motive of the vendor the test of the validity of the transfer, and this rule had the unanimous approval of English writers on international law. Now the Declaration of London created a new test, namely, that the transfer must not be made with a view to relieving the ship from liability to capture. Such a purpose establishes a separate and distinct ground for invalidating transfers.<sup>2</sup>

§ 131. What Rule to be Applied? If the rule regarding transfers of flag was not binding, since the Declaration of London was never ratified, what rule should have been applied in determining the validity or invalidity of such transactions as the sale of the *Dacia*? As there was no generally accepted rule prior to the outbreak of the war governing transfers, manifestly each belligerent was free to insist upon the rule which it had always maintained, provided, of course, it was not contrary to existing treaties or to the well-established principles of international law governing the rights of belligerents and neutrals.<sup>3</sup>

<sup>1</sup> For an analysis of these presumptions, cf. Bentwich, *The Declaration of London*, p. 106, and Wilson on *International Law*, p. 409.

<sup>2</sup> That this was the purpose of article 56 appears clearly from the report of the Conference committee on the transfers of flag. *Proceedings of the International Naval Conference*, Annex No. 141, p. 327.

<sup>3</sup> Cf. the remarks of Senator Root in the Senate, January 25, 1915, *Congressional Record*, p. 2461, and an editorial in the *Amer. Jour. of Int. Law* for January, 1915, p. 201.

Germany, France, and Russia had maintained one rule: the absolute invalidity of transfers made during war; Great Britain, Austria-Hungary, and Japan had maintained a different rule: the validity of transfers made during war, provided they were *bona fide* transactions and not made during the course of a voyage or in a blockaded port. But two of the powers which had maintained the former rule were allied with two of those which had maintained the latter rule; and one of those which supported the former rule was in alliance with one of those which heretofore recognized the latter rule. Thus the lack of a common rule in each case among those which were allies greatly complicated the question. In the case of transfers from German to neutral registry Great Britain might, therefore, have been expected to apply the rule which she had always maintained, in which case the transfer would be sustained, provided it were a *bona fide* and complete transaction and not merely colorable or fictitious. On the contrary, in the case of captures made by French cruisers the prize courts of France would naturally apply the old French rule. But as the rule of the Declaration of London made it more difficult to sustain the legality of transfers than did the former English rule, it was to the interest of England that the rule of the Declaration should be applied and not the former English rule and practice, which made the character of the transaction alone the test and not the motive of the vendor.

§ 132. **Decision of the French Council of Prizes.** The French prize council might have taken the position that the Declaration of London, never having been ratified, was not binding, and consequently the transfer was according to the old French rule invalid whatever may have been the motive of the claimant in purchasing the ship. But it did not take this position. On the contrary, it agreed to treat article 56 of the Declaration as binding, just as the Italian prize court had done in the cases of the *Vasilios* and the *Aghios Georghios* during the Turco-Italian war. At the trial, counsel for the owner of the *Dacia* argued that the transfer had not been made to avoid the consequences to which an enemy vessel as such is exposed, but that the purchase was a transaction made in the normal course of the claimant's shipping business. His sole object, he said, in making the purchase was to obtain at a reasonable price a vessel which he needed. The prize council, however,

rejected this plea and asserted that the proof adduced was insufficient in view of the fact that the ship was idle because of the risk of possible capture, if it had left an American port. The American solicitor of the department of state had expressed in a memorandum of August 7, 1914, the opinion that the rule of the Declaration of London looked only to the good faith of the transfer (that is, to a transfer made without defeasance or reservation of title or interest by the vendor) and not to the ulterior motives of the parties, and this ruling was relied upon by the owner of the *Dacia* in support of his claim. The prize council, however, pointed out that this was not the view of the Naval Conference, nor that embodied in the report presented to the Conference, nor that laid down in the German, Austrian, Russian, British, French, and Italian prize regulations.

On this point the view of the French council of prizes was unquestionably sound. An examination of the proceedings of the Naval Conference, to say nothing of the plain language of article 56 of the Declaration, shows that it was the intention of the Conference to add a new and separate test to that of good faith, namely, the absence of an ulterior motive on the part of the vendor in disposing of his vessel. This is the construction that has generally been given to the clause by commentators and writers on international law.

The burden of proof was on the claimant to show not only that the sale was a *bona fide* transaction, but that the purpose of the vendor in selling the ship was not to withdraw it from the risk of capture. The first proposition was easy enough to establish, but the proof of the latter consisted only of assertion. It was therefore decreed that the ship with its rigging, apparatus, and supplies should be condemned as good prize. As regards the cargo, the council was not called upon to decide upon its validity. Subsequently, payment for the cargo was made to its owners.<sup>1</sup>

§ 133. Observations on the *Dacia* Decision. It is quite clear that the *Dacia*, with other German vessels, took refuge in American ports in order to escape capture and that they remained there for the same reason. Therefore, if they were

<sup>1</sup> See the text of the decision in 22 *Rev. Gén. de Droit Int. Pub.* (1915), *Jurisprudence*, pp. 83 ff. An English translation of the text may be found in the *Amer. Jour. of Int. Law* for October, 1915, pp. 1015 ff.

sold by their owners to neutral purchasers and transferred to neutral registries, the motive was to withdraw them from the liability to capture, to which they would have been exposed if they had left under a belligerent flag.<sup>1</sup> On the other hand, it might have been, and was so argued, that the purpose of sale in such cases was not to withdraw the ship from the risk of capture, since there was no danger of capture so long as it remained in a neutral port, but rather to realize immediately upon property which was idle and unproductive.<sup>2</sup>

This latter view is undoubtedly more in accord with the modern theory of freedom of trade and with practice in the past. Certainly it was not the intention of the Naval Conference to prohibit transfers during war under all circumstances. Lord Crowe, one of the British delegates, said at one of the sessions of the Conference: "It is certain that during every war prize courts will be called upon to pronounce judgment upon a number of sales made in good faith, since there will always be a regular traffic in ships as in other objects."<sup>3</sup>

Westlake apparently takes the position that the prohibition of the Declaration is directed rather against transfers *in transitu* and not against those made in neutral ports,<sup>4</sup> and this view has much to commend it. The Declaration of London forbids transfers only during a voyage or in a blockaded port; it recognizes inferentially the right to make transfers in other places, although it creates a presumption of invalidity. Yet if a transfer made in a neutral port is unlawful because the purpose could only be to elude capture, we may well ask, where and under

<sup>1</sup> Cf. on this point the remarks of Senator Norris in the Senate, January 29, 1915, *Congressional Record*, pp. 2745 and 2748; of Senator Root, January 25, 1915, *ibid.*, p. 2455, and of Senator Lodge, *ibid.*, pp. 3782 ff.

<sup>2</sup> Cf. the remarks of Senator Walsh in the Senate, January 28, 1915, *Congressional Record*, p. 2667.

<sup>3</sup> *Proceedings of the International Naval Conference, House of Commons Sessional Papers, Misc.*, No. 5 (1909), p. 167.

<sup>4</sup> *International Law*, Vol. II, p. 149. Cf. also *International Law Topics, Naval War College Publications*, 1910, p. 111.

In this connection it may be remarked that the rule adopted by the Institute of International Law is not directed against transfers in neutral ports, but against those made *in transitu*. This rule is that "the legality act establishing the sale of an enemy ship during war must be perfect and the ship must be registered conformably to the registration laws of the country whose nationality it acquires before leaving port, and that no transfer made during the course of a voyage is legal." *Règlement International des Prises Maritimes*, 9 *annuaire*, § 26.

what circumstances would transfers be lawful? The only possible conclusion is that if the transfer of the *Dacia* was invalid (assuming, of course, that the legal formalities required by the Declaration were complied with), there are apparently no conceivable circumstances under which transfers from belligerent to neutral flags can be made after the outbreak of war.

§ 134. **Abrogation of Article 57 of the Declaration of London.** As has been said, both the British and French governments at the outbreak of the war proclaimed those rules of the Declaration of London relating to transfers of flag to be in force, notwithstanding the fact that neither government had ratified the Declaration. It was soon discovered, however, that the rule laid down in article 57, namely, that the neutral or enemy character of a vessel is determined by the flag it is entitled to fly, protected German-owned vessels from capture so long as they navigated under a neutral flag. Accordingly the British government by an order in council of October 25, 1915, abrogated article 57 and declared that in lieu thereof the British prize courts should "apply the rules and principles formerly observed in such courts." This was to meet the situation caused by the action of German ship-owners in America in resorting to the use of the American flag to protect cargoes which were being shipped from America to neutral ports in Europe, particularly in Holland, and from which they were being transhipped to Germany.<sup>1</sup> The British government took the position that this was a subterfuge; but so long as the rule of the

<sup>1</sup> The London *Times* of October 26, discussing the order in council abrogating article 57, said the modification had "become necessary by the experience of the war, and it was astonishing that the old rule had ever been supported." The rule of the Declaration of London which made the flag the test of the neutral or enemy character of the ship "opened the door to fraudulent abuses on an extensive scale. . . . The old rule, elaborated by distinguished English and American judges, which made the character of the ship depend upon the character of the owner, and to which the British government now reverted, embodied the natural and common sense view and therefore when the court was satisfied that there existed an enemy interest in a ship such interest would be liable to condemnation . . . a rule which even the Declaration of London maintained in respect to cargoes." Professor Holland in a letter to the London *Times* urged the abandonment of the rule laid down in the Declaration of London. The flag, he asserted, was conclusive as to the character of the vessel only when it was an enemy flag. If it was a neutral flag, it was permissible to go behind the flag and inquire into the nationality of the owners. He also pointed out that inasmuch as British subjects held interests in neutral ships, the abrogation of article 57 would result in injury to British as well as enemy interests.

Declaration of London was in force, cargoes under the American flag were protected in spite of the fact that the ships were German-owned. The only way to meet this situation was to adopt the rule that the nationality of the owner should be considered as the test of enemy or friendly character, and this rule was substituted for that of article 57 of the Declaration of London. Six days later the French government followed the action of the British government, but instead of abrogating outright article 57, the same result was achieved by declaring that it should be applied during the present war subject to the following modification: "Whenever it is established that a ship flying a neutral flag belongs in fact to the nationals of an enemy country or to parties residing in an enemy country, the ship shall accordingly be considered as an enemy ship."

§ 135. **Seizure of German-owned Ships under Neutral Flags.** The new rule was soon put into effect by the seizure of several ships belonging to the American Transatlantic Company, which, it was alleged, was financed largely by capital furnished by Germans. The circumstances which gave rise to the controversy which followed were briefly the following: A fleet of merchant vessels had been bought by one Jensen, a Copenhagen coal merchant, from German, Greek, Dutch, Norwegian, and Swedish owners, the money being furnished, it appears, by a capitalist and ship-owner of Essen. Jensen having, according to the *London Times*,<sup>1</sup> been convicted and sent to prison by a Dutch court for sending contraband into Germany, was unable to complete the transaction, and it was carried through by one Theodore Lehr of Rotterdam. At this juncture eleven of the vessels were sold to Richard Wagner, a German-American citizen and the head of the newly organized American Transatlantic Company, which thereupon applied to the United States department of commerce to have the ships admitted to American registry under the Act of August 18,

<sup>1</sup> Of October 29, 1915. Secretary Lansing in May, 1917, disclosed to the interstate commerce committee evidence of a German plot by which the German government or certain Germans had hoped to involve the United States in a controversy with Great Britain and France by organizing a steamship company in the United States with American directors but financed with German capital to purchase and operate vessels in foreign trade, in the expectation that they would be seized by British and French cruisers. *New York Times*, May 30, 1917.



1914. The commissioner of navigation, who is charged with issuing certificates of registry, after an investigation was satisfied that their ownership was largely German, and he ruled that they were not entitled to American registry under the terms of the above-mentioned act, which provides only for the registration of "American-owned" ships; but the law officers of the department took a different view and held that since the owners were a firm incorporated under the laws of Delaware, it mattered not who owned the stock or where the company obtained the funds, and the vessels were therefore entitled to American registers. Under these circumstances they were admitted to American registry in September and October, 1915, although it was stated in the press despatches that the bureau of navigation warned Wagner that if his vessels engaged in European trade, they would probably find their way sooner or later into a prize court.

Despite the fact that he heeded the warning of the bureau, his ships did not escape, for shortly afterwards several of them, notably the *Hocking*, the *Genesee*, and the *Kankakee*, were seized by British cruisers and taken into British ports, while another one, the *Solveig*, was seized by a French cruiser and taken into a French port. The *Solveig* was condemned by the council of prizes on the ground that, although flying a neutral flag, it was German-owned.<sup>1</sup> In February, 1917, the British prize court reached a similar conclusion in the cases of the *Kankakee*, *Hocking*, and *Genesee*. At the trial counsel for Wagner admitted that he had borrowed heavily of German capital, but denied that the ships were German-owned. The prize court, however, held that his company was merely a "covering" for the German Woermann shipping company.<sup>2</sup>

<sup>1</sup> Text of the decision in 23 *Rev. Gén. de Droit Int. Pub.* (1916), *Jurisprudence*, pp. 16 ff. Compare also the case of the *Willkommen* (24 *Rev. Gén., Jurispr.* 15) where the French prize council held enemy ownership rather than the nationality of the flag to be the test of liability to condemnation.

<sup>2</sup> Compare the case of the *Proton* in which the superior prize court of Egypt held that it is the duty of prize courts to ascertain what the character of a vessel really is, and if it appears to be only nominally owned by a neutral and is really owned by an enemy, it is not protected from condemnation although it may be entitled to fly a neutral flag. Trehern's *Cases*, III, 125. Compare also the case of the *Hamborn* (*ibid.*, 80) in which Sir Samuel Evans held that a ship registered in Holland and flying the Dutch flag and owned by a company registered in Holland but the business of which was managed by a German company under German

A somewhat similar case was the seizure in November, 1915, by a British cruiser of the *Presidente Mitre*, a steamer flying the Argentine flag but owned by the Hamburg South American Line, a German company. The ground upon which the seizure was made was that the ship was German-owned, and in accordance with the British rule which was substituted for article 57 of the Declaration of London the status of the vessel was determinable by the nationality of the owners and not by the nationality of its flag. The Argentine government protested against the seizure on the ground that the vessel had navigated under the Argentine flag for fifteen years and for the preceding ten years had plied exclusively between ports of Argentina. Moreover, the Argentine government called attention to the fact that the people of Argentina were largely dependent on German-owned vessels for the carriage of their commerce and especially for the transportation of coal for the use of the navy.<sup>1</sup> Subsequently the British government restored the vessel and agreed not to make further seizures of similar ships sailing under the Argentine flag, provided they were engaged only in trade between the ports of Argentina.

§ 136. **German Law and Practice.** Although the purchase and transfer to the American flag of German ships laid up in the ports of the United States would apparently have inured to the benefit of Germany, such a policy does not seem to have been encouraged by the German government, and, in fact, it appears to have been forbidden by an act of the German parliament of October 21, 1915.<sup>2</sup>

Nevertheless, as stated above, the German government agreed

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directors resident in Germany was liable to condemnation. It is a settled rule of prize law, said Sir Samuel, that prize courts will "penetrate through and beyond terms and technicalities to the facts and realities"; it is their duty to "pull off the mask and exhibit the vessel in her true character." The flag which a vessel is flying at the time of capture or which it is entitled to fly is not conclusive as to its character, the true test being ownership and control.

<sup>1</sup> Cf. the speech of Dr. Zeballos, member of the Argentine national congress, reproduced in the *Cong. Record* of the United States for February 21, 1916, p. 3366.

<sup>2</sup> English text by Huberich in *Solicitors' Journal and Weekly Reporter*, November 21, 1914, p. 70. Subsequently, however, some German vessels appear to have been transferred to neutral flags, especially Dutch. The treaty of peace (Annex III, par. 7) required Germany to take any measures that might be indicated to her by the Reparations Commission for obtaining the full title to the property in all ships which were transferred during the war to neutral flags without the consent of the allied governments.

to recognize the transfer of ships from an enemy to American registry, provided they were employed in the transportation of goods to German ports. Otherwise the transfers would be treated as unlawful.<sup>1</sup>

In accordance with this policy the German prize courts refused to recognize the validity of transfers from enemy to American registers except under the condition mentioned. A case involving this question was that of the *Pass of Balmaha*, which was originally a Canadian vessel, but which was sold to an American steamship company after the outbreak of the war and was admitted to American registry. While on her way to Archangel, Russia, with a cargo of cotton she was seized by a British cruiser and a British prize crew placed on board. While being taken to Falmouth, she was captured by a German submarine, taken to Cuxhaven and placed in the custody of a German prize court by which she was condemned in January, 1915, on the ground that the transfer from British to American registry was illegal. The American ambassador was instructed to protest against the seizure of the vessel on the ground that she was virtually owned in the United States before the change of registry took place and was wholly owned after the transfer.

§ 137. **Question Raised by the American Ship-purchase Bill of 1915.** The question of the legality of transfers of merchant vessels of belligerent nationality to a company in which a neutral government owns a majority of the capital stock was raised by the ship-purchase bill which was before the American Congress in 1915 and the passage of which was strongly urged by President Wilson as a necessary measure for increasing the American merchant marine with a view to meeting the situation caused by the lack of adequate shipping facilities for American commerce. This bill authorized the government of the United States to subscribe for fifty-one per cent of the capital stock of

<sup>1</sup> In 1917, after the United States entered the war, eight Austrian steamships then lying in the ports of the United States, Argentina, and Cuba were purchased by the Kerr Navigation Company of New York City and transferred to the American registry. Since the United States was at the time a belligerent and an ally of Great Britain and France, naturally they made no objection to the transfers. During the preceding year, when the United States was neutral, the German steamship *Georgia* was purchased by an American and registered under the American flag; but since she was employed in transporting grain to England and supplies for the Belgian relief commission, neither France nor Great Britain raised any objection.

any corporation organized under the laws of the United States or any state, for the purchase, maintenance, and operation of merchant vessels; it also provided that the secretary of the treasury, the postmaster general, and the secretary of commerce should constitute a board with full power to vote the stock of the United States and to carry out the purposes of the act, and that the President should be authorized to charter, lease, or transfer vessels purchased or constructed under the provisions of the act.

It was clearly the intention of the authors and advocates of the bill that the fleet contemplated should be acquired mainly by the purchase and transfer to American registry of German vessels then lying in American ports. This intention may be inferred from the refusal of the senate to adopt an amendment proposed by senator Lodge that no vessels should be purchased under the act which were the property of any citizen or subject of a belligerent State.

Assuming, therefore, that if the bill had become law and the company organized thereunder should have proceeded to purchase any such vessels, would the transactions have been inconsistent with the duties of neutrality? The question is certainly debatable. The purchase in such a case would have been a very different transaction from that involved in the case of the *Dacia*, where the parties were private citizens. In the former case the purchaser would have been a company directed by a board composed of three members of the cabinet, and a majority of the shares of stock of which was owned by a neutral government. In effect, therefore, the purchaser would have been the government of the United States. The fact that a portion of the stock was held by private citizens would hardly have altered the situation. While both England and the United States had always upheld the right of neutral *individuals* to purchase belligerent merchant vessels and to have them registered under a neutral flag whenever the transaction was a *bona fide*, fully perfected, and unconditional sale, neither had ever admitted that *governments*, either directly or indirectly through corporations which they control, might make such purchases and transfers. That it would have been an unneutral act was the opinion of Mr. Lansing, then counsellor of the department of state, and it was the view expressed by senators

Lodge, Root, McCumber, Burton, and Norris during the debates on the proposed bill. The bill failed to pass either house of Congress. A somewhat similar bill, however, became law in 1916, but it contained a provision forbidding the purchase, lease, or chartering of any vessel under the registry or flag of a foreign country then engaged in war. Happily, in this form the bill removed the possibility of foreign complications, which would probably have arisen, had it been passed without this proviso and had purchases and transfers to American registry been made of German and Austrian vessels then lying in American ports.

§ 138. **Controversy between Chili and Great Britain.** The people of Chili, like those of the United States, found themselves at the outbreak of the war largely deprived of ships for the carriage of their commerce.<sup>1</sup> The Chilean government thereupon entered into negotiations with the Kosmos Steamship Company of Germany with a view to purchasing some of its numerous ships then laid up in the ports and territorial waters of Chili. While the Chilean government did not consider that under the circumstances the purchase of ships of belligerent nationality lying in its ports, and their transfer to Chilean registry with a view to assuring the continuance of commerce with Europe and between its own ports, would be contrary to the spirit of article 56 of the Declaration of London, but at the same time, desiring to avoid any difficulties with Great Britain or her allies in regard to the status of vessels purchased from the German company and transferred to the Chilean flag, it made inquiries of the British government in a note of August 7, 1914, as to whether it would raise objection to the proposed transfers. In a reply of August 21 the British government acquiesced in the Chilean proposals, but at the same time indicated certain conditions under which the purchase of German ships should be effected. The conditions were that the transfers should be *bona fide*, entire, and permanent; that the vendor should not reserve the right of repurchase at the close of the war, and that the German crews should be displaced. The British government added that it would bring to the attention of its allies these conditions and at the same time expressed the hope that they would be acceptable

<sup>1</sup> Cf. the speech of Dr. Zeballos referred to above, *Congressional Record*, February 21, 1916, p. 3366.

to the government of Chili. The conditions insisted upon by the British government were accepted by the Chilian government; but in a communication of September 13, 1914, the British government imposed a new condition, namely, that the ships which the Chilian government proposed to purchase should not be employed directly or indirectly in commerce with any countries with which Great Britain was at war.

Adverting to the proposed purchase of German vessels by the government of the United States, the British communication called attention to a note which the French government had addressed to the American government, in which it was stated that the French government did not regard the proposed transfers as in accordance with international law. The soundness of this position the British government considered irrefutable; in consequence, the recognition of the validity of the proposed transfers to the Chilian flag under the conditions specified must be considered as a voluntary concession on the part of His Majesty's government, and the hope was expressed that the government of Chili would recognize the justice of this position. In view of the attitude of the British government in regard to the matter, the project of the Chilian government, however, was abandoned.<sup>1</sup>

M. Alvarez, the well-known Chilian jurist, commenting on the attitude of the British government, pertinently remarks that if in the future the confiscation of property at sea is to be maintained, the question of the transfer of flags must be so regulated as to give better guarantees for the protection of the commercial interests of the States of America. If, he adds, a belligerent has the right to requisition neutral merchant vessels which at the beginning of hostilities find themselves in its harbors, the same consideration requires that neutral governments should have the right to requisition merchant vessels belonging to belligerents which are found in their ports, provided that it is done with a view to continuing the commerce, to the carrying on of which such ships are necessary. In short, the interests of neutrals as well as of belligerents should receive some consideration.<sup>2</sup>

<sup>1</sup> The above-mentioned facts regarding the Chilian project and the attitude of the British government are set forth in M. Alvarez' *La Grande Guerre Européenne et la Neutralité du Chili*, 1915, pp. 261-265.

<sup>2</sup> *Ibid.*, p. 265.

§ 139. **Transfer of War Ships from Belligerent to Neutral Flags.** While the right of a neutral to purchase under certain conditions the merchant vessels of a belligerent, either before or after the outbreak of war, is admitted, the better opinion is against the right of a belligerent under any circumstances to transfer his war vessels to a neutral flag with a view to withdrawing them from the risk of capture. This question was raised in connection with the reported sale by the German government to the Turkish government of two cruisers, the *Goeben* and the *Breslau*, shortly after the outbreak of war between Great Britain and Germany. Upon the outbreak of war the two cruisers took refuge in Turkish waters, after which they were said to have been purchased by the Turkish government. Against this transfer the British government protested and declared the transaction to be contrary to international law. The ships were given Turkish names, and although Turkey was professedly neutral, they took part in the bombardment of the Russian port of Odessa before the formal outbreak of war between Russia and Turkey.<sup>1</sup> Undoubtedly the cruisers would have been captured by the naval forces either of Great Britain or of France, had they remained at sea. The purpose of the sale to the Turkish government, therefore, was evidently to deprive Great Britain and France of their right of capture under the recognized rules of international law.

There have been several cases in former wars involving the question of the legality of such transactions, and in all of them the courts pronounced the transfers illegal. The first case was that of the *Minerva*,<sup>2</sup> decided by Sir William Scott in 1807. It involved the legality of the sale of a Dutch war vessel to a neutral during the war between Great Britain and Holland. The ship was captured by the British naval forces and was condemned by Sir William Scott on the ground that the transfer deprived Great Britain of the right of capture and was therefore illegal.

<sup>1</sup> Cf. British correspondence relating to the rupture of relations with Turkey, especially Nos. 84 and 88. See also Müller-Meiningen, *Der Weltkrieg, 1914-1915, und der Zusammenbruch des Völkerrechts*, pp. 507 ff. The American ambassador to Turkey narrates the circumstances under which the two war ships entered Turkish waters. The "sale" to the Turkish government, he says, was a sham, and the German ambassador, Wangenheim, admitted as much. *Ambassador Morgenthau's Story*, p. 78.

<sup>2</sup> 6 C. Rob. 396.



Another case was that of the *Etta*, decided by a United States district court during the American civil war. The ship was a confederate privateer under the name of the *Retribution*, which was sold to a neutral in the port of Nassau in 1863 and whose name was changed to that of the *Etta*. Upon being captured by the naval forces of the United States, it was condemned by the district court.<sup>1</sup>

A third and better known case was that of the *Georgia*,<sup>2</sup> a confederate cruiser which ran into the port of Liverpool in 1864 to escape capture and while there was sold to a British subject. Subsequently, while under a charter party to the Portuguese government, it was captured on the high seas by the naval forces of the United States and was condemned by the Supreme Court, largely on the authority of the decisions in the cases of the *Minerva* and the *Etta*. Adverting to the contention of the claimants that at the moment of sale the *Georgia* was not a war vessel, but had been dismantled and had her armament removed, and that having been fitted out and sold as a merchant vessel, the transaction was unobjectionable, Mr. Justice Nelson remarked:

"But the answer to the suggestion is, that if this change in the equipment in the neutral port and in the contemplated equipment in the future of the vessel, could have the effect to take her out of the rule and justify the purchase, it would always be in the power of a belligerent to evade and render futile the reasons on which it is founded. This rule is founded on the propriety and justice of taking away from the belligerent, not only the power of rescuing his vessel from pressure and impending peril of capture, by escaping into a neutral port, but also to take away the facility which would otherwise exist, by a collusive or even actual sale, of again rejoining the naval force of the enemy."

This view of the law is that held by most of the text writers who have considered the subject.

§ 140. Sale of Enemy Cargo to Neutral Purchaser in Anticipation of War. The question of the legality of the sale of an enemy cargo to a neutral purchaser before the outbreak of war was passed upon by the British prize court in the case of the *Southfield*, decided in July, 1915.<sup>3</sup> This case involved the legality of a sale by German merchants to certain Dutch merchants between July 20 and July 30, 1914, of certain parcels

<sup>1</sup> 25 Fed. Cases, No. 15, p. 60.

<sup>2</sup> 7 Wallace 32.

<sup>3</sup> Trehern, *British and Colonial Prize Cases*, Vol. I, pp. 332 ff.

of cargo *in transitu* shipped on board a British steamship and consigned to a German port "to order." The Dutch merchants duly paid for the goods, which they resold to customers of their own. On August 4 war broke out between Great Britain and Germany, and when the ship called at a British port, the cargo was seized as good prize. On the authority of Lord Stowell in the case of the *Vrow Margaretha*,<sup>1</sup> of Dr. Lushington in the case of the *Baltica*,<sup>2</sup> and of Judge Story in his *Principles and Practice of Prize Courts*,<sup>3</sup> Sir Samuel Evans held that such a transaction was legal. The "special and highly artificial rules" regarding the transfer of vessels during or preceding a state of war did not, he said, "apply to the sale of goods and merchandise." The facts showed that the neutral purchasers acted with complete *bona fides* throughout; they paid for the goods and resold them to neutral customers before war was declared. Moreover, the court said, it was satisfied that the vendors did not have in contemplation the outbreak of war between their country and Great Britain (to which the ship carrying the goods belonged) when they sold the goods, and the imminence of war between Germany and Russia had no material bearing on the case.

<sup>1</sup> 5 C. Rob. 336.

<sup>2</sup> 11 Moore P. C. 141

<sup>3</sup> Ed. by Pratt, pp. 64-65.

## CHAPTER VIII

### TRADE AND INTERCOURSE WITH THE ENEMY

#### A. ANGLO-AMERICAN AND CONTINENTAL THEORIES COMPARED

§ 141. Subject not Regulated by International Law; § 142. The Anglo-American Rule; § 143. The Common Law Rule Applies to All Intercourse with the Enemy; § 144. Test of Enemy Character; § 145. Relaxations from the Common Law Rule.

#### B. STATUS OF CORPORATIONS UNDER ENEMY CONTROL —

§ 146. British Legislation; § 147. The Continental Tyre and Rubber Case; § 148. Decision of the House of Lords; § 149. Right of Enemy Shareholders to Vote Stock; § 150. Views of the Prize Court; § 151. Trade with a House in Occupied Enemy Territory; § 152. The Question of Enemy-controlled Companies in France; § 153. French Practice; § 154. American Judicial Authority.

#### C. TRADE WITH ENEMY PERSONS AND HOUSES IN NEUTRAL COUNTRIES

§ 155. British and French Policies at Variance; § 156. British "Black List" Legislation; § 157. The American Representation and the British Reply; § 158. The American Protest; § 159. The British Answer; § 160. Merits of the American Contention; § 161. The United States as a Belligerent Adopted the British and French Policy.

#### D. CONTINENTAL LEGISLATION AND PRACTICE

§ 162. French Legislation and Practice — the Decree of September 27, 1914; § 163. Judicial Interpretation of the Decree; § 164. German policy — Ordinance of August 10, 1914; § 165. Ordinance of September 30, 1914; § 166. Judicial Interpretation; § 167. Character of the German Legislation.

#### A. ANGLO-AMERICAN AND CONTINENTAL THEORIES COMPARED

§ 141. Subject not Regulated by International Law. As to the effect of war upon commercial relations and intercourse generally between the inhabitants of opposing belligerent States international law lays down no rules. The whole matter is therefore left to be regulated by the municipal law of each State concerned. In practice two rules are followed. According to the usual practice of continental European States the outbreak of war does not *ipso facto* render illegal trade with

persons in enemy territory. Such trade is therefore regarded as legitimate until it has been expressly forbidden by municipal legislation.

§ 142. **The Anglo-American Rule.** According to the common law of England, on the other hand, all commercial intercourse with the enemy or with persons residing in enemy territory, even though they be British subjects, becomes illegal *ipso facto* by the outbreak of war, and no express legislation is necessary to establish its illegality. Engaging in such trade is unlawful except in so far as it is authorized by municipal legislation.<sup>1</sup> "It is the established law of nations," said Chitty, "that when war has taken place between two or more States all commercial intercourse between the subjects of each must immediately cease, unless it be expressly stipulated otherwise by treaty; . . . there is no such thing as a war for arms and a peace for commerce."<sup>2</sup> The leading English case on the subject is that of the *Hoop*, decided by Sir William Scott in 1799,<sup>3</sup> and the rule there laid down was recently affirmed by the English court of appeal in the case of *Porter v. Freudenberg*.<sup>4</sup> In the latter case the court said:

"Ever since the great case of *The Hoop* the law has been firmly established as pronounced in the judgment of Lord Stowell (then Sir William Scott) that one of the consequences of war was the absolute interdiction of all commercial intercourse or correspondence by a British subject with the inhabitants of the hostile country except by permission of the Sovereign. . . . This branch of law was again considered as a result of the Crimean War, and Willes, J., in delivering the judgment of the court of Queen's Bench in *Esposito v. Bowden* (7 E. & B. 779), said: 'It is now fully established that, the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse except with the license of the Crown is illegal.' "

<sup>1</sup> Cf. Leslie Scott, "Effect of War on Contracts," in the 28th *Report of the International Law Association*, p. 155.

<sup>2</sup> *Commercial Law*, Vol. I, p. 377.

<sup>3</sup> 1 C. Rob. 196. The common law courts tardily adopted this view; but after the decision of the admiralty court in the case of the *Hoop* it came to be generally the accepted rule and was applied by them. Cf. Huberich, *Trading with the Enemy*, p. 27.

<sup>4</sup> 1 K. B. 857 (1915). As to the English doctrine cf. Cobbett's *Leading Cases*, Vol. II, pp. 74 ff.; Phillipson, *Effect of War on Contracts*, pp. 26 ff.; Trotter, *Effect of War on Contracts*, pp. 29 ff.; Hall, *International Law*, 6th ed., p. 383, and Phillimore, *International Law*, § 69.

This is also the American doctrine and practice. It was thus stated by Kent who, after reviewing the leading authorities, said:

"We see that the highest authorities on the law of nations . . . unitedly prove, that all private communications and commerce with an enemy in time of war, are unlawful, and that by the mere fact and force of the declaration of war, the subjects of the one State are placed in direct hostility to the subjects of the other."<sup>1</sup>

Again referring to the above quoted passage from Chitty, Kent observed that

"This is equally the doctrine of all the authoritative writers on the law of nations and of the maritime ordinances of all the great powers of Europe. It is equally the received law of this country and was decided frequently by the Congress of the United States during the Revolutionary War, and again by the Supreme Court during the last war."<sup>2</sup>

The Anglo-American doctrine is also approved by some continental publicists.<sup>3</sup> But an increasing number of text writers condemn the rigor of the Anglo-American rule and maintain that war should not *ipso facto* put an end to commercial intercourse, but that its legality should be made to depend upon express legislation.<sup>4</sup> Dr. Schuster, an English authority on the subject, points out that the rigor of the old rule is out of harmony with modern conditions.<sup>5</sup> Baty, who likewise combats the Anglo-American rule, remarks that it is based on the idea that commercial intercourse with the enemy necessarily augments his resources, although he says this idea was scarcely

<sup>1</sup> *Griswold v. Waddington*, 16 John N. Y. 438 (1819).

<sup>2</sup> *Commentaries*, Vol. II, pp. 67-68. Cf. also the more recent case of *Insurance Company v. Davis* (1877). For other American cases in which the same view is maintained cf. Scott, *Cases on International Law*, pp. 531-565, and Evans, *Cases on International Law*, pp. 235 ff.

<sup>3</sup> For example by Bonfils, *Droit Int. Pub.*, § 1060; Geffcken, ed. of Heffter, n. 5 to § 123; Merignhac, *La Guerre sur la Terre*, § 32, and Pillet, *Les Lois Actuelles de la Guerre*, § 40.

<sup>4</sup> For example, Hershey, *Essentials of Pub. Int. Law*, p. 367; Bordwell, *Law of War*, p. 202; Bentwich, *War and Private Property*, ch. 5; Phillipson, *Effect of War on Contracts*, p. 53; Westlake, *Int. Law*, Vol. II, p. 44; Rivier, *Principes de Droit des Gens*, Vol. II, p. 231; Lawrence, *Principles of Int. Law*, § 143; Evans, *Cases on International Law*, pp. 256-257; Bluntschli, *Droit Int. Cod.*, § 674; Heffter, *Das Moderne Völkerrecht*, § 123; Leuder, *Holtendorffs Handbuch*, Vol. IV, p. 358; De Visscher, *Du Caractère Ennemi et de la Condition des Personnes quant à l'Exercice de leurs Droits Civils*, *Law Qu. Review*, July, 1915, pp. 289-298, and Sieveking, "Influence of War on Private Contracts," *Int. Law Assoc. Reports*, 1913, pp. 169 ff.

<sup>5</sup> *Effect of War and Moratorium on Commercial Transactions*, p. 59.

relied upon before the middle of the nineteenth century.<sup>1</sup> Bentwich likewise remarks that where the weakening of the enemy or the prevention of the increase of his power of resistance are not advanced, there is no reason for prohibiting trade with him. And he adds: "So delicate is the organism of modern commerce that all gratuitous interference with it should be avoided. . . . The harm done to national prosperity by sweeping restraints on trade may far outweigh the harm done to the enemy."<sup>2</sup>

§ 143. **The Common Law Prohibition Applies to All Intercourse.** Some writers doubt whether the common law prohibition was ever intended to apply to intercourse other than that of a commercial character. In fact, both the British proclamations and the American Trading with the Enemy Act (1917) prohibited only "trade," "commercial intercourse," and the "doing of business" with the enemy. The American act in fact, while prohibiting all forms of communication not under license, distinguished between commercial and non-commercial intercourse and brought only the former under the definition of trade. Nevertheless the British courts during the recent war interpreted the prohibition to apply to non-commercial as well as commercial intercourse. Thus in the case of *Premier Oil and Pipe Line Company* the chancery division, following Lord Stowell's decisions in the cases of the *Hoop* and the *Cosmopolite*, construed the British proclamations to prohibit intercourse of every kind.<sup>3</sup> Likewise the prize court, in the case of the *Panariellos*, ruled that *all* intercourse, whether commercial or otherwise, was prohibited.<sup>4</sup> In the course of his judgment Sir Samuel Evans said:

"The following general propositions can, I think, be established: First, when war breaks out between States, all commercial intercourse between citizens of the belligerents *ipso facto* becomes illegal, except so far as it may be expressly allowed or licensed by the head of the State. Where the intercourse is of a commercial nature, it is usually denominated 'trading with the enemy.' This proposition is true also, I think, in all essentials with regard to intercourse which cannot fitly be described as commercial."

<sup>1</sup> "Intercourse with Alien Enemies," *Law Quarterly Review*, January, 1915, pp. 30-49. Cf. also Huberich, *Trading with the Enemy*, pp. 30-31; and Bentwich, *War and Private Property*, p. 51.

<sup>2</sup> *War and Private Property*, p. 61.

<sup>3</sup> 31 *L. T. R.* 420 (1915).

<sup>4</sup> 31 *L. T. R.* 326 (1915).

In 1917 the High Court also ruled that "any intercourse of any kind is unlawful if it be inconsistent with the existing hostilities of their States." Bare intercourse, where not commercial in its nature, is not pronounced to refer to trading with the enemy, although it is unlawful if not licensed.<sup>1</sup> Whether Lord Stowell and the United States Supreme Court (in the early cases of the *Rapid* and the *Julia*) really intended to sanction so extreme a view has been questioned. The ancient rule regarding the confiscation of private property, it is argued, was long ago abandoned; why, therefore, should the courts feel bound today to apply in all its rigor the old rule regarding intercourse with the enemy whenever it is not clearly required by considerations of national defence or public policy? The ancient rule applied by the English courts in the above-mentioned and other cases has recently been challenged in England.<sup>2</sup>

§ 144. **Test of Enemy Character.** Another difference between the Anglo-American rule and the rule generally observed on the continent, at least prior to the late war, relates to the test adopted for determining enemy character so far as trading with the enemy is concerned. According to the Anglo-American practice, the nationality of the person or house of trade is not conclusive as to his or its friendly or enemy character, but

<sup>1</sup> *Rex v. Snow*, 23 L. T. R. 256 (1917).

In *Tingley v. Müller*, 116 L. T. R. 482 (1917), the court of appeal held that while all commercial intercourse and all other intercourse which might benefit the enemy was forbidden, a power of attorney from a German in England was not avoided by the defendant's becoming an enemy, and that an agreement for the sale of the defendant's property did not involve intercourse with the enemy. Lord Justice Scrutton, however, dissented and stood by the doctrine of Lord Stowell in the *Hoop*, that all intercourse was prohibited even if it did not injure the country or help the enemy.

<sup>2</sup> The *London Solicitors' Journal and Weekly Reporter* (issue of March 10, 1915, p. 393) in an editorial criticising the extreme view adopted in the case of *Premier Oil and Pipe Line Company* expressed regret that the chancery division should have lent "any countenance to the obviously impossible doctrine that all intercourse with enemy subjects is prohibited," and the hope was ventured that "a superior tribunal would adopt a more sensible and convenient view and state quite clearly that it is only *commercial* intercourse which is forbidden." In its issue of April 3, 1915 (pp. 375-376), the same journal criticises the decision of judge Atkin of the central criminal court in the case of *Oppenheimer* for adopting the same view as that laid down by Sir Samuel Evans in the case of the *Panariellos*. The case of *Oppenheimer* involved the question of the legality of the act of an English subject in accepting the delivery by a firm of German printers at Nuremberg of certain lithographs which were already his property.



residence,<sup>1</sup> and especially the place where the business is carried on, is emphasized, whereas on the continent nationality has heretofore been the determining factor.<sup>2</sup> The British courts have repeatedly held in the past that a British, allied, or neutral subject domiciled in or carrying on business in enemy territory<sup>3</sup> is an enemy in respect to trading,<sup>4</sup> but the subjects of an enemy State residing in neutral territory were never before the recent war treated as enemies. It was in accordance with the former principle that the British proclamation of September 9, 1914, declared that the term "alien enemies," for the purposes of trade, should include not only subjects of enemy States but all other persons residing in enemy territory. All persons, of whatever nationality, residing in enemy country were therefore enemies in respect to trade and intercourse, since trade with them might serve to augment the resources of the enemy as much as if they were subjects of an enemy State.<sup>5</sup> In short, residence or domicile or the place of business and not nationality is the test of enemy character for purposes of trade; personal allegiance is immaterial. British subjects, therefore, who reside or carry on trade in an enemy country are assimilated to the position of enemy subjects so far as trade with them is concerned. This

<sup>1</sup> As to what constitutes "residence" cf. the review of the cases in Huberich, *Trading with the Enemy*, pp. 54-55.

<sup>2</sup> On the continent it had long been the general rule that only a subject of an enemy State, whatever be his domicile or residence, is an enemy; in short, hostile character was coincident with political allegiance. According to English and American law, however, a subject of an enemy State, resident or domiciled in a neutral State, was not regarded as an enemy. But by the so called "black list" acts of Great Britain and the United States, to be hereafter discussed, the continental rule was adopted by those two countries, at least so far as trade with persons of enemy nationality in neutral countries was concerned.

<sup>3</sup> Territory under the occupation of the enemy is considered enemy territory within the sense of the trading with the enemy legislation. Thus by a British proclamation of July 16, 1915, those parts of the territory of Belgium and France at the time occupied by German troops were declared to be enemy territory within the meaning of the trading with the enemy acts and proclamations. The Scotch court of session in 1916 went to the extreme length of holding that two Dutch partners who resided in and carried on business in Holland, but who at the same time carried on business in Antwerp, then under the occupation of Germany, were enemies to Great Britain within the sense of the trading with the enemy legislation. *Van Uden v. Burrill*, S. C. 391 (1916).

<sup>4</sup> Cf. especially the case of *Janson v. Dreifontein Consolidated Mines*, A. C. 505 (1902), and the cases cited in Schuster, *Effect of War and Moratorium on Commercial Transactions*, p. 3.

<sup>5</sup> Cf. Sieveking in *Int. Law Assoc. Reports*, 1913, p. 169.

principle was also laid down in the American Trading with the Enemy Act of October 6, 1917, which declared that "any individual, partnership or other body of individuals, of any nationality, resident within the territory of any nation with which the United States is at war or resident outside the United States and doing business within such territory" should be deemed an enemy within the meaning of the act. French legislation was based on the same theory, so that trade with a Frenchman residing in enemy country was as unlawful as trading with an enemy subject.<sup>1</sup> In the cases of *Porter v. Freudenberg*, *Kreglinger v. Samuel and Rosenfeld*,<sup>2</sup> and *Re Martens Patents*, decided January 19, 1915, the English court of appeal considered at some length the question as to who were alien enemies. Among other things it said the term "alien enemy" in its natural meaning "indicates a subject of enemy nationality — that is, of a State at war with the King — and would not in any circumstances include a subject of a neutral State or of the British crown," but it added that this is not the sense in which the term is used in reference to civil rights. Then referring to the decision of Sir Willam Scott in the case of the *Hoop* and of Mr. Justice Wiles in *Esposito v. Bowden*, the court declared that a British subject residing in hostile territory was as much an enemy within the meaning of the enemy trading act as a subject of the enemy State. On the other hand, it was held in the case of the *Duchess of Sutherland v. Bubna* that the subject of an enemy State carrying on business in British or neutral territory was not an alien enemy,<sup>3</sup> and contracts with such persons were not prohibited by the proclamation of September 9.<sup>4</sup> So in the case of *Princess Thurn and Taxis v. Moffitt* it was held that permission to remain in England divested an enemy alien who had complied with the requirements of the Registration Act of enemy character so far as the right to bring an action

<sup>1</sup> Schweitzer, *L'Interdiction du Commerce avec l'Ennemi*, p. 33. This writer, however, distinguishes between residence and domicile and maintains that it would have been legal for a Frenchman to trade with a person domiciled in Germany though not with a person residing there.

<sup>2</sup> 1 K. B. 857 (1915).

<sup>3</sup> The rule here stated was modified of course by the subsequent act of Parliament prohibiting British subjects from trading with enemy firms or firms of hostile association in neutral countries.

<sup>4</sup> *Law Times*, July 19, 1915.

in a British court was concerned.<sup>1</sup> The policy of treating enemy aliens in England as being on the same footing as British subjects in respect to commercial and financial privileges did not however escape criticism.

The decision in *Porter v. Freudenberg* was in accord with the English doctrine that the test of enemy character for purposes of trade is domicile rather than nationality, for "it is clear," said the court, "that the test is not nationality, but the place of carrying on the business." In line with this doctrine was the decision of the king's bench division in *Ingle v. Mannheim Insurance Company*, that for the purpose of enforcing a contract of insurance made between a British company and a German subject in England, the latter was not to be treated as an enemy alien, this on the ground that the place of carrying on the business was the test of enemy or friendly character.<sup>2</sup> In the case of the *Marie Glaeser* the prize court held that shareholders in and mortgagees of an enemy ship, even though British subjects or citizens of neutral States, were to be regarded as enemy aliens so far as their right to a share in the proceeds from the sale of the condemned vessel was concerned.<sup>3</sup> It would seem to follow logically from this principle that the converse of the rule is true, namely, that subjects of enemy nationality not domiciled in or carrying on business in their own country but residing in British or neutral territory are not enemy aliens, and Lord Lindley in the case of *Janson v. Dreifontein* asserted in fact that "the subject of a State at war with this country but who is carrying on business here . . . is not treated as an alien enemy."<sup>4</sup> During the late war the English courts often ruled that persons of enemy nationality residing in Great Britain were not necessarily to be treated as enemies, subject to all the disabilities of enemy aliens, provided they had registered and had complied with the terms of the Alien Restrictions Act and the orders issued thereunder.<sup>5</sup> By the British and French

<sup>1</sup> 31 *Law Times*, Rep. 24. This decision was followed in the case of *Volk v. Governors of the Rotunda Hospital* (2 Ire., 543) and was approved by the court of appeal in the case of *Porter v. Freudenberg*.

<sup>2</sup> 31 *L. T. R.* 41.

<sup>3</sup> Trehern, *British and Colonial Prize Cases*, Vol. I, p. 38.

<sup>4</sup> A. C. 505 (1902). But as Schuster points out, Lord Lindley probably had reference to enemy subjects residing in England under a license. *Op. cit.*, p. 4.

<sup>5</sup> Thus an enemy subject residing in Great Britain and carrying on business there was not an enemy alien in the sense that contracts could not be entered into with such a person or that he could not sue in the courts.

so called "black list" measures of 1916, however, prohibiting their nationals from trading with persons or houses of enemy nationality or of "hostile associations" in neutral countries, the converse of the rule referred to above was not recognized. For purposes of trade such persons and houses were treated as being enemies; that is to say, nationality rather than domicile was considered the test.<sup>1</sup>

§ 145. **Relaxations from the Common Law Rule.** While it has long been a rule of the English common law that the outbreak of war automatically interdicts all trade with the enemy, it is also a rule that the crown may in its discretion grant relaxations by means of licenses, either general or special, to British subjects to carry on trade with the enemy, either with or without restrictions. Thus during the Crimean war a general license was granted to British subjects to trade under neutral flags with non-blockaded Russian ports, except in contraband goods.<sup>2</sup> Likewise during the South African war certain relaxations were allowed.<sup>3</sup> As is well known, licenses to trade with the enemy were issued by the government of the United States on a somewhat extensive scale during the Civil war. During the recent war a general license was granted to all persons resident or carrying on business or being in the British dominions, to pay to enemy governments the fees necessary to obtain the grant or renewal of patents, or the registration or renewal of the registration of designs or trade-marks in enemy countries, and to pay on behalf of an enemy, fees for the same purposes in order to avoid the permanent loss of English property through inability to comply with the requirements of the law of enemy States. Germany accorded reciprocal treatment to British subjects in Germany. By the American Trading with the Enemy Act American citizens, when duly authorized

<sup>1</sup> The American Trading with the Enemy Act also adopted this principle. It enacted that "such other individuals or body or class of individuals, as may be natives, citizens or subjects of any nation with which the United States is at war, other than citizens of the United States *wherever resident or wherever doing business*, the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may by proclamation, include within the term 'enemy.'" § 2 (c). Cf. also the interpretative remarks of Mr. Montague, *Cong. Record*, July 18, 1917, p. 5772, and July 11, *ibid.*, p. 5458.

<sup>2</sup> Trotter, *Effect of War on Contracts during War*, 1st Supp., p. 38. Cf. also the case of the *Neptune*, Spink's *Prize Cases*, p. 281.

<sup>3</sup> Phillipson, *Effect of War on Contracts*, p. 95.

by the President, were granted permission to pay similar fees to enemy governments. The French government made similar relaxations. British owners of cargoes on enemy ships lying in neutral ports were likewise empowered to pay freight and other necessary charges to enemy agents at such ports for the purpose of obtaining possession of their goods. A license to trade with the enemy was granted by the United States war trade board to the American Red Cross, it being given the exclusive privilege of sending letters, food, and money to American prisoners in German camps.

#### B. STATUS OF CORPORATIONS UNDER ENEMY CONTROL

§ 146. **British Legislation.** Such are the Anglo-American and continental doctrines in respect to the status of persons, so far as trading with the enemy is concerned. What is the status of a company incorporated under the laws of a particular belligerent State when the company is under enemy control or is one in which subjects of an enemy State have a substantial interest? This question raised perplexities in nearly every belligerent country during the recent war. The British emergency legislation defined the term "enemy alien" to include: (a) A firm which by reason of its constitution may be considered as managed or controlled by enemy subjects, or the business whereof is wholly or mainly carried on in behalf of such subjects; (b) a company which has received its constitution in an enemy's State; (c) a company registered in His Majesty's dominions, the business whereof is managed or controlled by enemy subjects, or is carried on wholly or mainly on behalf of such subjects.<sup>1</sup> It was clearly the intention of the British government to treat companies registered in England and carried on or managed wholly or mainly by enemy subjects as enemy concerns; but it is not clear whether it was the intention to treat as enemy companies those in which all or a portion of the shareholders were enemy subjects, but of which British subjects were the directors wholly or in preponderating part.

According to a decision in *Salomon's* case in 1897<sup>2</sup> an incorporated company was held to be a separate entity from its

<sup>1</sup> Notice dated August 21, 1914. Pulling's *Manual of Emergency Legislation*, p. 229.

<sup>2</sup> *Salomon v. Salomon*, A. C. 22.

shareholders, that is, its nationality might be different from that of the individual shareholders; consequently a company incorporated in England and carrying on business there was a British company, notwithstanding that all its shareholders might be persons of enemy nationality.

§ 147. **The Continental Tyre and Rubber Case.** The question of the status of enemy-controlled companies registered in England was first presented to the English courts during the recent war in the case of the *Continental Tyre and Rubber Company v. Daimler and Company*.<sup>1</sup> The plaintiffs were a German company, incorporated in England and constituting a branch of a German firm at Berlin. All of the 25,000 shares of the English subsidiary company, except one (which was held by a British subject), were owned by German subjects resident in the German Empire, and all the directors were of German nationality. The plaintiff company claimed payment for tires sold and delivered to the defendant before the outbreak of the war. The defendants pleaded that the plaintiffs could not receive payment or legally enforce their claim, since the transaction would be with and for the benefit of enemy subjects, under the terms of the proclamation of September 9, 1914. They contended also that the directors, being enemy subjects, could not bring a suit in a British court. The company was therefore in every sense, except technically, an enemy company, and the artificial creation was merely a mask or cloak to conceal the real identity and character of the persons who owned its stock and directed its affairs. This contention the court of appeal swept aside and ruled that the company was a distinct and separate entity from the stockholders who composed it, and being registered in England, it was an English company and could therefore bring the action and recover the debts due it. From this decision Mr. Justice Buckley dissented in a vigorous opinion. He admitted that the artificial legal entity created by incorporation under the Companies Act was a legal person existing apart from its corporators. This proposition, he said, was true without exception, but on the other hand, the corporation could not exist without corporators.

"The artificial legal person called the corporation," he said, "has no physical existence. It exists only in contemplation of law. It has neither

<sup>1</sup> Decided January 19, 1915. *Law Times*, Vol. 112, pp. 324 ff. 1 K. B. 893.

body, parts, nor passions. It cannot wear weapons nor serve in the wars. It can neither be loyal or disloyal. It cannot compass treason. It can be neither friend nor enemy. Apart from its corporators it can have neither thoughts, nor intentions, for it has no mind other than the minds of the corporators. . . . This corporation is one which, as a corporation, certainly has in law an independent legal existence, and that legal person is British. But on the other hand, all its directors are Germans, resident in Germany. The holders of all its 25,000 shares, except one, are Germans, resident in Germany. The artificial legal thing is British resident in England. But all its corporators who can have thoughts, wishes or intentions are Germans, resident in Germany."

He was of the opinion therefore that the company was an enemy concern without power to maintain an action in the courts for the recovery of the debts claimed.

§ 148. **Decision of the House of Lords.** The majority opinion was strongly attacked by many English authorities, and the hope was expressed that the decision would be reversed by the House of Lords or overruled by an Act of Parliament.<sup>1</sup> Their hopes were soon realized, for on appeal to the House of Lords<sup>2</sup> the decision of the court of appeal was reversed,

<sup>1</sup> Cf., e.g., the letter of Lord Lindley who, like Lord Buckley, is regarded as one of the highest authorities in England on the subject of corporation law (*London Times*, January 28, 1915). It was a "startling conclusion," said Lord Lindley, "that a joint stock company, registered and incorporated under the joint stock companies acts, but completely under the control of Germans resident in Germany was an alien friend and entitled to maintain an action in our courts." Cf. also the criticism by the editor of the *Law Times* (May 22, 1915), who pointed out that the decision in *Salomon's Case*, on which the court mainly relied in the present case, had been overruled by the House of Lords. For further criticism of the decision, cf. the *Law Times* of October 24, 1915, and the *Law Quarterly Review* of July, 1915, p. 217, in the latter of which it was said that the fictitious personality of the company could not alter the fact that, in dealing with it, one was actually dealing with enemies. In an editorial in the *Law Quarterly Review* of April, 1915, p. 170, the judicial doctrine is reviewed. Reference is made to the case of *Bligh v. Brent* (1837), where Baron Alderson said that the individual members of a corporation are quite as distinct from the metaphysical body called the corporation as any other of His Majesty's subjects are. Reference was also made to the case of the *Roumanian* (1914), where the president of the prize court held that a German corporation must be regarded as an enemy alien notwithstanding that some of the incorporators were British subjects.

<sup>2</sup> Already the admiralty court had considered and passed upon the question of the status of enemy-controlled companies registered in England. In the case of the *Polzeath*, P. D. 117 (1916), Mr. Justice Deane had said: "To decide the true character and entity of a business or company you must ascertain where the motive or directing force of the business or company comes from; in other words, where the real life is, and not where the limbs move to give effect to that living power."



and it was held to be permissible to go behind the incorporation and ascertain its national character by the nationality of its stockholders and directors; that the secretary of the company, being the only British shareholder, had no authority to bring the action on behalf of his company, and that all the directors being enemy subjects, they could not lawfully give him the authority, and if they could, the secretary could not receive it without holding intercourse with the enemy in violation of the law. Nevertheless a majority of the Lords held that a company incorporated in England was not necessarily an enemy company merely because a majority of its shareholders were persons of enemy nationality, though it might become such by carrying on business in enemy territory or if its business was controlled by persons resident in enemy territory or adhering to the enemies of the country under whose laws the company was incorporated. Lords Halsbury, Mersey, Kinnear, and Sumner were of the opinion that the company was an enemy concern, but Lords Shaw and Parker dissented from this view. Nevertheless the company had no authority to bring the action, since the directors had not conferred authority on it, nor could they have done so, because they were enemies.<sup>1</sup> On the whole, the decision of the House of Lords is authority only on the question as to the right of the secretary of the company to bring action. It is not authority on the question as to whether an enemy-controlled company was an enemy in the meaning of the Trading with the Enemy Acts and proclamations.

<sup>1</sup> 2 A. C. 507 (1916). For an analysis and commentary on the decision cf. the *Law Times* of July 8, 1916, p. 174, and November 11, 1916, pp. 18-19; Huberich, *Trading with the Enemy*, pp. 72-76, and Hogg in the *Law Qu. Rev.*, 33: 76-77. The whole question of the status of such companies is learnedly discussed by Mr. E. J. Schuster in the *Grotius Soc. Pubs.*, Vol. II, pp. 57 ff., and by Baty in *International Law Notes*, September, 1917. Cf. also a list of references to the extensive literature on the case by Professor E. M. Borchard in the *Yale Law Journal*, Vol. 27, p. 109. In the later case of *Elders and Fyffes v. Hamburg Amerikanische Paketfahrt Aktien Gesellschaft* the court refused to apply the doctrine of the House of Lords in the *Continental Tyre and Rubber Company* case that foreign control makes a foreign company, in such a way as to deprive a company registered in England of the status of an English company. Mr. Justice Bray stated that he regarded the decision of the House of Lords as authority not for the proposition that a foreign company registered in England ceased to be an English company when its shareholders became enemy subjects, but for the proposition that it becomes both a foreign and an English company. *London Solicitors' Journal*, Vol. 61, p. 729.

§ 149. **Right of Enemy Shareholders to Vote Stock.** The question as to whether enemy shareholders in a British company might during the existence of war exercise the right of voting their stock in a meeting of the shareholders was presented to the court of appeal in the case of *Robeson v. Premier Oil and Pipe Company, Ltd.*, in May, 1915.<sup>1</sup> The British company was a branch house of a German firm, the *Disconto Gesellschaft* of Berlin. The appellants, five German shareholders whose votes had been rejected, pleaded that the common law prohibition in respect to intercourse with enemy aliens was limited to trading and commercial dealings and did not cover such transactions as the voting of shares of stock. There was nothing in the Trading with the Enemy Act or the proclamations issued thereunder, they contended, which prohibited the exercise of such a right, and consequently it was not unlawful. The court of appeal, however, rejected this view and upon the authority of Lord Stowell in the case of the *Hoop*, of Sir Samuel Evans in the case of the *Panariellos*,<sup>2</sup> of the king's bench division in *Rex v. London County Council*,<sup>3</sup> of Lindley *On Companies*,<sup>4</sup> and of Westlake on *International Law*<sup>5</sup> held that enemy aliens could not lawfully exercise the right of voting their shares of stock.

"This transaction," said Mr. Justice Pickford, "tends to the detriment of the country and to the advantage of the enemy. All intercourse which so tends, whether commercial or not, is forbidden. That this transaction has such tendency is clear. The proposed exercise of voting power is for the purpose of obtaining control and management or of a large voice in it, of a British trading company which owns large property in the enemy country."

He thought also that the rejection of the votes could be justified on the narrow ground that this was a commercial transaction. "Commercial intercourse," he said, "is not confined to making contracts between an alien enemy and a British subject and such a transaction as this, directed to obtaining the control of a trading company, is in our opinion commercial." The decision of the court, however, was criticised even in England.<sup>6</sup>

<sup>1</sup> *L. T. R.* November 20, 1915, p. 523.

<sup>2</sup> 112 *L. T. R.* 777.

<sup>3</sup> 113 *L. T. R.* 118.

<sup>4</sup> 6th ed., p. 52.

<sup>5</sup> Pt. II, pp. 53-54.

<sup>6</sup> Cf., e.g., an editorial in the *London Solicitors' Journal* of April 10, 1915 (p. 302), where it was attacked as "unreasonable and not in accord with the enlight-

§ 150. **Views of the Prize Court.** In the case of the *Poona* Sir Samuel Evans was called upon to decide upon the claim of a company registered in England, all the directors of which were enemy subjects resident in Germany and all the shareholders in which were either persons of enemy nationality or were persons resident in Germany. The crown contended that the company was an enemy concern and that the goods which it claimed ought to be condemned. Sir Samuel decided, however, that out of respect to the court of appeal he ought to follow its judgment in the case of the *Continental Tyre and Rubber Company*, notwithstanding the fact that its decisions were not binding upon the prize court, and however much he might feel inclined to sympathize with the dissenting opinion of Justice Buckley. The judgment of the court, therefore, was that the goods were not the property of an enemy, and they were ordered to be released.<sup>1</sup> The case of the *Roumanian* involved among other questions the status of an "international combine," that is, of a company incorporated in Germany, most of the shares in which were held by companies incorporated under the laws of various countries which were not enemies of Great Britain. For this reason the claimants contended that the German company was not an enemy to Great Britain and its property was therefore not liable to condemnation, but that account should be taken of the various shareholders who were subjects of States in alliance or amity with Great Britain. Sir Samuel Evans, however, thought the prize court could not look beyond the legal entity, which was the German company. Notwithstanding, therefore, its international position, due to the fact that most of its shares were held by companies not of enemy nationality, the company itself was of enemy nationality, and the goods which it claimed must be condemned.<sup>2</sup>

§ 151. **Trade with a House in Occupied Enemy Territory.** The question of the right of British subjects to trade with a company incorporated under the laws of Belgium and having

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ened tendencies of modern times. . . . To refuse proxies and leave the management of companies to what may be an insignificant minority of *English* shareholders," said the editor, "is quite at variance with the position in which enemy shareholders are entitled to be placed under the Trading with the Enemy Act."

<sup>1</sup> Trehern's *Cases*, Vol. I, pp. 275 ff. No appeal lies from the decisions of the prize court to the court of appeal.

<sup>2</sup> *Ibid.*, Vol. I, pp. 75 ff.

Its registered office in Antwerp, after the military occupation of a part of Belgium by the German armies, was presented to the English court of appeal in July, 1915, in the case of the *Société Anonyme des Mines d'Aljustrel v. Anglo-Belgian Agency, Limited*. After the German occupation of Belgium the plaintiffs presented a check to the defendant company for one hundred pounds, but the company refused to pay it on the ground that the plaintiff company, being situated in territory under the military occupation of the enemy, was technically an enemy to Great Britain. Payments to it, therefore, were unlawful, and the company was debarred from bringing an action in a British court for the recovery of the debt. But the court refused to adopt this view. Although, it said, Belgium was occupied by the enemy it had not been annexed to Germany. No Belgian was a subject of a State at war with His Majesty. On the contrary, Belgium was the closest ally with England. The expression "enemy country" in the Trading with the Enemy Acts and proclamations had reference to Germany and Austria-Hungary. The act did not mention territory in hostile occupation and it did not apply to a company incorporated in such territory. Moreover, not all of Belgium was occupied by the enemy, nor was the company incorporated in Antwerp but "in Belgium." The whole of Belgium would have to be occupied to bring it under the terms of the act. In fact, only a strip in the northwestern part was occupied by Germany. The company was carrying on business substantially in England, and only by a technicality could it be said to be an enemy. The decision of the lower court was therefore overruled, and it was held that Belgium was not an enemy country in the sense of the Trading with the Enemy Act and the proclamations issued thereunder.<sup>1</sup>

§ 152. **The Question of Enemy-controlled Companies in France.** The question of the status of companies composed wholly or in part of enemy shareholders and organized under French law was the subject of much discussion and of judicial interpretation in France. Professor Lyon-Caen, one of the highest French authorities on the subject, defines a foreign company as one which has its active seat (*siège social*) in a foreign country and a French company as one which has its real situs

<sup>1</sup> *L. T. R.* November 27, 1915, p. 581.

in France.<sup>1</sup> But in France as in England there were companies falling in the second category which were composed wholly or in preponderating part of enemy shareholders or were directed wholly or in part by enemy directors. They were French companies only in a technical legal sense, the corporate entity being merely a mask which concealed the real identity and character of those who composed the company. What was the status of such a company under the decree of September 27, 1914? Could it sue in the courts, and was it liable to be placed under sequestration as an enemy concern? Most French authorities, like those of England, held to the separate entity theory, that is, the nationality of a company is distinct from that of its shareholders and directors, and consequently a company composed of enemy shareholders and having its principal house in France is a French company.<sup>2</sup> The question, however, as to whether such a company is entitled to be treated as a French company for all purposes has been much controverted.

§ 153. French Practice. By a circular of July 29, 1916, relative to the compulsory declaration of enemy property the judicial authorities were instructed by the minister of justice to make every effort to ascertain the real character of all *personnes morales* and to avoid being misled by appearances. They were informed that "those which were apparently French but which on account of their direction or whose capital was wholly

<sup>1</sup> Cf. his article *Des Conditions à Exiger pour que les Sociétés soient Françaises*, Clunet, 1917, pp. 5 ff.

<sup>2</sup> This is the view of Lyon-Caen, cited above, and of Professor Valéry of Montpellier. Cf. the latter's *Manuel de Droit Int. Privé*, § 891; also his article entitled *Conditions en France des Ressortissants des Puissances Ennemies*, in the *Rev. Gén. de Droit Int. Pub.*, 1916, pp. 390 ff. It is also the view of M. Clunet. Cf. his treatise *Les Associations au Point de Vue Historique et Juridique*, 1909, Vol. I, §§ 394 ff. Professor Paul Pic of Lyons discussed the subject at length and analyzed French authority and jurisprudence in an article entitled *De la Nationalité des Sociétés* (Clunet, 1917, pp. 841 ff.). His conclusion was that according to the overwhelming weight of French authority the situs of the company determines its enemy or friendly character. If the *siège social* is in French territory, it is a French company, regardless of the nationality of its directors or shareholders. Nevertheless, he added, in time of war this rule may be departed from, and it belongs to the courts to decide whether a company registered in France is in reality a *bona fide* French company or a *personne interposée* under cover of which an enemy company may be concealed. He quoted various decisions of the French courts during the recent war to show that they had repeatedly held such companies to be enemy companies. His own view was that the general rule stated above must be departed from only when the interest or control of enemy persons in the company is entire or predominantly so (p. 849).

or in major part owned by enemy subjects must be assimilated to the status of enemy companies.”<sup>1</sup> The legal form in which a company is clothed, the domicile of its principal establishment, and similar criteria, said the circular, are not conclusive in determining the nationality of a company in the face of the fact that the whole or major part of its capital is owned by enemy subjects and its affairs managed by persons of enemy nationality. “Behind the fiction of the law was often to be found the dissimulated, living, acting personality of the enemy himself.”<sup>2</sup> This circular was issued following a decision of the court of appeal at Rouen on November 3, 1915, that notwithstanding the preponderance of German and Austro-Hungarian shareholders in a company registered in France, it was still a French company, and only the enemy interests in the company were liable to sequestration.<sup>3</sup> Nevertheless, the courts held that such a company might be an enemy under certain circumstances, in which case the enterprise as a whole was subject to sequestration.<sup>4</sup> In the case of a house at Lyons it was held that a company composed of shareholders the great majority of whom were Germans, but which was organized and registered under French law, was a German enterprise and as such was subject to sequestration. The court of appeal declared that it had the right “to go to the bottom of things and ascertain whether it was a French company in reality or such only in appearance.” The decision was affirmed by the court of cassation and the principle definitely laid down that such houses were *personnes interposées* with which trade was prohibited by the decree of September 27.<sup>5</sup> Likewise it was held that mixed companies of this character situated in allied or neutral territory and having branch houses in France were enemy companies.<sup>6</sup>

<sup>1</sup> Clunet, 1916, p. 701.

<sup>2</sup> Text in Reulos, *Manuel des Séquestres*, p. 189.

<sup>3</sup> Case of the *Établissements Union*, text in Clunet, 1916, pp. 251 ff. Cf. also Clunet, 1915, pp. 1095 ff.; 1916, pp. 610, 616, and 1917, pp. 5 ff., for similar holdings.

<sup>4</sup> Cf. the case of the *Société du Casino et des Bains de Mer de Cherbourg*, Clunet, 1916, p. 613, and the case of *Freitag v. Rochelle*, *ibid.*, p. 1290.

<sup>5</sup> *Société Conserve Lenzburg*, Clunet, 1915, pp. 1164 ff.

<sup>6</sup> Cf. Clunet, 1916, pp. 1269 and 1278, and Reulos, pp. 360 ff., for citation of cases. Other similar cases are referred to by Pic in the article cited above and in Troimaux, pp. 117 ff. But it should be noted that in various cases the French courts held that where the enemy interest or control was not preponderant, the company should not be treated as an enemy concern. Cf. Clunet, 1916 D. 610; 1917, p. 38, and Reulos, ch. 7, § 6.

§ 154. **American Judicial Authority.** By the American act of October 6, 1917, to define, regulate, and punish trading with the enemy the word "enemy" was defined to include among other things any "partnership or other body of individuals resident within enemy territory or doing business within such territory and any corporation incorporated within enemy territory or incorporated outside the United States and doing business in enemy territory."<sup>1</sup> But it contained no reference to corporations incorporated within the United States and in which enemy persons exercised the controlling interest. The assistant attorney-general of the United States, speaking on this point at a hearing before a sub-committee of Congress, said:

"We have specifically abstained in the bill from attempting to go behind the corporate charter. If the corporation is an American corporation, then it can do business in this country. . . . In England they attempted to go behind the charter of an English corporation and they attempted to hold that an English corporation which was controlled by German stockholders was an enemy within the purview of their Act, and they landed in inextricable confusion. . . . Here we have solved that by saying we will not go behind the corporate charter, no matter how many German stockholders there may be."<sup>2</sup>

This view was in accord with American judicial authority. In the early case of the *Society for the Propagation of the Gospel v. Wheeler*<sup>3</sup> Mr. Justice Story held that a British corporation composed of British shareholders might sue in the courts of the United States during the war of 1812, but the decision was based upon a technical point of pleading, and the opinion was no authority for the view that a domestic corporation composed of enemy aliens could not be an enemy itself. The decision was based on the ground that the averments as pleaded did not show that the members were actually attached to the enemy or resident in enemy territory, and the court could therefore reach the conclusion that "a British corporation could sue in our courts while we were at war with Great Britain, only by holding that the residence or national character of a corporation was not fixed by its place of incorporation, but that the courts may determine the character of the

<sup>1</sup> § 2 a.

<sup>2</sup> Hearings on H. R. 4960, 198, Sen. Doc. No. 111, 65th Cong., 1st Ses.

<sup>3</sup> 2 Gall. 105 (1814).



corporation from the character of its members.”<sup>1</sup> In the case of the *Continental Tyre and Rubber Company v. Daimler* referred to above, Lord Reading relied upon the decision of the United States Supreme Court in the case of *United States v. Deveau*<sup>2</sup> for authority in refutation of the separate entity theory. In that case, he said, the Supreme Court decided that it could look beyond the corporate name and inquire into the character of the individuals who composed the corporation. The authority of this and the preceding case has recently been reëxamined at length by the New York supreme court in a case involving the right of a New Jersey corporation composed mainly of German subjects living in Germany, but a majority of the directors of which were residents of the United States, to bring an action in an American court during the existence of war between the United States and Germany.<sup>3</sup> In upholding the right to bring the action the court expressed the opinion that the authority in the case of *United States v. Deveau* had been much limited, if not overruled, by subsequent cases and that “at the present time the courts of this country are entirely wedded to the doctrine that the corporators of a corporation are conclusively presumed to be citizens of the same State as the corporation.” The statements of Lord Reading and Lord Parker in the *Daimler* case, that the Supreme Court had laid down the principle that a court may look behind the corporate name to ascertain the character of the individuals composing it, was, said Justice Lehman, obviously not accurate,

“Throughout all these decisions,” he added, “the courts have indicated practically unanimously that they regard a corporation as an entity separate and apart from its corporators; that its domicile is as a matter of law within the State of its creation; and that the courts will not regard it merely as an association of individuals or regard the domicile or character of the corporators as affecting the domicile or character of the corporation.”<sup>4</sup>

In so far, therefore, as the House of Lords announced a different rule in the *Daimler* case, it was not in accord with the doctrine of the American courts.

<sup>1</sup> Quoted from the opinion of Lehman, J. of the New York supreme court, in the case of *Fritz-Schultz Co. v. Raimes Co.*, 100 Misc. (N.Y.), 697 (1917).

<sup>2</sup> 5 Cranch 61.

<sup>3</sup> *Fritz-Schultz Co. v. Raimes Co.*, cited above.

<sup>4</sup> The decision in this case was approved in *Stumpf v. Scheiber Brewing Co.*, 242 Fed. 80 (1917). Cf. also *Posselt v. D'Espard*, 100 Atl. 893 (N.J. 1917).

§ 155. Trade with Enemy Houses in Neutral Territory Prohibited. British and French Policies at Variance. As has been said, the test at first adopted by the British government for determining enemy character for purposes of trade was the domicile of the person or house rather than his or its nationality. Thus by the proclamation of September 9, 1914, the expression "alien enemy" employed therein was declared to mean any person or body of persons of whatever nationality resident or carrying on business in the *enemy country*, but it did not include persons of enemy nationality who were neither resident nor carrying on business in the enemy country. In the case of incorporated companies, enemy character was declared to attach only to those incorporated in enemy territory. The proclamation also contained a proviso to the effect that where an enemy had a branch locally situated in British, *allied, or neutral territory*, not being neutral territory in Europe, transactions by or with such branch should not be treated as transactions by or with the enemy. According to this proclamation it was entirely lawful for British subjects to trade with enemy persons or branch houses in neutral countries outside Europe. Such persons or houses were deemed to possess a neutral nationality. But under the French rule, which made nationality rather than domicile the test of enemy character, trade between persons resident in France and enemy persons or houses in neutral countries was trade with the enemy and therefore unlawful.<sup>1</sup>

<sup>1</sup> In August, 1915, the French government issued a circular containing a list of houses considered as being of enemy nationality or enjoying in respect to the enemy the position of *personnes interposées*, and situated in neutral countries. The list was subdivided into four parts corresponding to the principal divisions of the world, in each of which neutral countries were arranged in alphabetical order and under each of which followed a list of houses with which Frenchmen were forbidden to trade. Other houses were added from time to time, and French traders were warned that the fact that an enemy house was not on the list did not legalize trade with it. In trading with houses in neutral countries they would do well, therefore, to satisfy themselves of their innocent character. As to houses in Switzerland certain relaxations from the rule were made. The list as originally published filled eight pages in the *Journal Officiel* (August 6, 1916, pp. 7052 ff.) and it became, says Clunet, the "breviary" of French traders (Clunet, 1916, p. 1510). The French charged that the policy of "black listing" enemy firms in neutral countries had already been adopted by the Germans, and the *Lokal-Anzeiger* of April 1, 1916, was quoted as authority for the statement that German watch-makers had boycotted Swiss watch-makers who were suspected of selling watches to enemy houses. Clunet, *Le Commerce avec L'Ennemi et les Listes Noires*, *Jour. de Droit Int.*, 1916, p. 1507. Italy likewise forbade its nationals at home as well as those residing abroad to trade with "black-listed" houses in neutral countries.

As compared with British merchants, French merchants were thus placed at a disadvantage, and there was some complaint that the allied governments were not pursuing a common policy in respect to trade with the subjects of a common enemy resident in neutral territory.

§ 156. **British "Black List" Legislation.** The British government thereupon decided to adopt the policy of France, and by an Act of Parliament of December 23, 1915,<sup>1</sup> the government was authorized to prohibit by proclamation all persons residing in the United Kingdom from trading with "any persons or bodies of persons not resident or carrying on business in enemy territory or in territory in the occupation of the enemy . . . whenever by reason of the enemy nationality or enemy association of such persons . . . it appears expedient to His Majesty so to do." The act further provided that any list of persons or bodies of persons with whom such trading was prohibited might be varied or added to by an order made by the Lords of the Council on the recommendation of a secretary of state. The provisions of the various trading with the enemy acts were extended to apply to all such persons or bodies of persons. Thus the ancient Anglo-American test for determining the status of enemy persons was abandoned, and the continental test of nationality was substituted. "Enemy persons" henceforth were to include not only those residing in enemy territory, but also persons of "enemy nationality and association" residing in neutral countries, and the same penalties were prescribed for trading with the latter as with the former.

In pursuance of the authority thus granted, the government proceeded to issue a list of persons and firms in neutral countries, with which trade was forbidden. The total number of such persons and firms is said to have exceeded fifteen hundred.<sup>2</sup> As originally published, the "black list" contained the names

<sup>1</sup> Text in *Diplomatic Correspondence with Belligerent Countries, European War*, No. 3, p. 54.

<sup>2</sup> The lists were published from time to time in the *London Gazette*. According to *Syren and Shipping*, an English marine journal, the number of "black-listed" persons and firms in the various countries was as follows: Spain, 167; Brazil, 140; Netherlands, 120; Argentina and Uruguay, 95; Morocco, 88; Portuguese East and West Africa, Guinea, and Rio Muni, 87; Japan, 86; United States, 85; Norway, 83; Portugal, 79; Sweden, 72; Netherlands and East Indies, 70; Ecuador, 69; Persia, 56; Greece, 59; Philippines, 44; Peru, 41; Chili, 35; Bolivia, 22; Cuba, 10; Central America, 5; Paraguay, 3; Colombia, 1. It will be noted that Japan, an ally of Great Britain, is included in the list, while Switzerland is omitted.

of eighty-five persons and firms in the United States.<sup>1</sup> The publication of the "black list" caused the persons and firms affected to address protests to their governments, and in the United States, in particular, it provoked widespread criticism.

§ 157. **The American Representation and the British Reply.** On January 25, 1916, the secretary of state of the United States in a communication<sup>2</sup> to the American ambassador at London stated that the new Trading with the Enemy Act was "pregnant with possibilities of undue interference with American trade." The act had been formed, he said, without "a proper regard for the right of persons domiciled in the United States, whether they be American citizens or subjects of countries at war with Great Britain, to carry on trade with persons in belligerent countries." The ambassador was requested to call the attention of Sir Edward Grey to the "grave apprehensions" entertained by the American government and to present to him a formal reservation of the right of the government to protest against the application of the act in so far as it affected the trade of the United States. In a communication dated February 16, 1916,<sup>3</sup> the British foreign office explained the purpose and scope of the act and gave assurances that the powers which it conferred on the government would be exercised with every possible regard for neutral commerce. The act was framed, it was said, with the object of bringing British trading with the enemy regulations into greater harmony with those adopted by the French government since the commencement of the war,

<sup>1</sup> The list is published in the *New York Times* of July 19, 1916. The information on the basis of which the American firms were "black-listed" appears to have been furnished by their agents in Great Britain. The board of trade requested all such agents to furnish information concerning the nationality of the persons composing their firms, together with lists of their stockholders and their addresses, the number of shares held by each, etc. The requests for this information called forth strong protests from the American firms to which they were addressed. Cf. the *Cong. Record* of January, 1916, p. 106.

<sup>2</sup> The text of this communication and the other correspondence between the American and British governments regarding the so-called "black list" measure, down to May 10, 1915, may be found in a white paper issued by the department of state, entitled *Diplomatic Correspondence with Belligerent Countries relating to Neutral Rights and Duties, European War, No. 3*, printed and distributed August 12, 1916, pp. 54-84. See also two British white papers entitled *Trading with the Enemy (Extension of Powers) Act, 1915*, Misc., No. 11 (1916), Cd. 8225, and No. 36 (1916), Cd. 8353.

<sup>3</sup> Text, *ibid.*, pp. 56-57.

by applying in some degree the test of nationality in the determination of enemy character in addition to the old test of domicile, which, experience had shown, could not provide a sufficient basis under modern commercial conditions for measures intended to deprive the enemy of all assistance, direct or indirect, from national resources. Although the application in its fullest extent of the principle of nationality was entirely legitimate, it was added, Parliament had not gone to the full length of its power, but had extended the principle only to purely commercial relations.

"His Majesty's government readily admit the right of persons of any nationality resident in the United States to engage in legitimate commercial transactions with any other persons. They cannot admit, however, that this right can in any way limit the right of other governments to restrict the commercial activities of their nationals in any manner which may seem desirable to them by the imposition of prohibitions and penalties which are operative solely upon persons under their jurisdiction."

§ 158. **The American Protest.** Meantime the "black list" had been published, and the persons and firms affected were pressing the American government to take more vigorous action against the policy of the British government. On July 26, 1916, the department of state addressed a formal protest to the British government in which the "scope and effect" of the British policy were described as "extraordinary" and "arbitrary" and had caused the "most painful surprise" in the United States. British steamship companies would not, it was alleged, accept cargoes from the proscribed firms or persons or transport their goods to any port, and steamship lines under neutral ownership understood that if they accepted freight from them, they were likely to be denied coal at British ports and excluded from other privileges which they had usually enjoyed, and might themselves be put upon the "black list." Neutral bankers refused loans to those on the list, and neutral merchants declined to contract for their goods, fearing a like proscription. It was evident that this measure was

"inevitably and essentially inconsistent with the rights of the citizens of all nations not involved in the war. . . . It condemns without hearing, without notice, and in advance. It is manifestly out of the question that the government of the United States should acquiesce in such methods or applications of punishment of its citizens."<sup>1</sup>

<sup>1</sup> Text in British white paper referred to above (*Misc.*, No. 36, 1916, Cd. 8353).

Whatever may be said of the legality of the Act of Parliament, the note concluded, it was inconsistent with that "true justice, sincere amity and impartial fairness which should characterize the dealings of friendly governments with one another," and the American government could not be expected to consent to see its citizens put upon an "ex parte black list without calling attention in the gravest terms, to the many serious consequences to neutral rights which such an act must necessarily involve."

§ 159. **The British Answer.** To this communication Sir Edward Grey replied in a note dated October 10, in which he referred to the Act of Parliament as a "piece of purely municipal legislation" intended to prohibit persons in the United Kingdom from trading with persons of enemy nationality or association in neutral countries. It was simply a measure to enjoin those who owed allegiance to Great Britain from having trade relations with persons who were found to be assisting or rendering service to the enemy.

"I can scarcely believe," he said, "that the United States government intend to challenge the right of Great Britain as a sovereign State to pass legislation prohibiting all those who owe her allegiance from trading with any specified persons when such prohibition is found necessary in the public interest. The right to do so is so obvious that I feel sure that the protest which your Excellency handed to me has been founded on a misconception of the scope and intent of the measures which have been taken."

Turning to the question whether domicile alone was a sufficient test for determining enemy character for purposes of trade, Sir Edward observed that

"As the United States government are well aware, the Anglo-American practice has in times past been to treat domicile as the test of enemy character, in contradistinction to the continental practice, which has always regarded nationality as the test. The Anglo-American rule crystallized at a time when means of transport and communication were less developed than now, and when in consequence the actions of a person established in a distant country could have but little influence upon a struggle. Today the position is very different. The activities of enemy subjects are ubiquitous, and under modern conditions it is easy for them, wherever resident, to remit money to any place where it may be required for the use of their own government, or to act in other ways calculated to assist its purposes and to damage the interest of the powers with whom it is at war. No elaborate exposition of the situation is required to show

that full use has been and is being made of these opportunities. . . . In the face of enemy activities of this nature, it was essential for His Majesty's government to take steps that should at least deprive interests so strongly hostile of the facilities and advantages of unrestricted trading with British subjects. The public opinion of this country would not have tolerated the prolongation of the war by the continued liberty of British subjects to trade with and so to enrich the firms in foreign countries whose wealth and influence were alike at the service of the enemy."

In conclusion Sir Edward repeated the assurances already given that the measures adopted would not be carried any further than was absolutely necessary to weaken the resources of the enemy.

§ 160. **Merits of the American Contention.** As to the legal right of a belligerent to prohibit persons domiciled in its own territory from trading with persons of enemy nationality, or from having hostile connections in neutral countries, there would seem to be little reason for doubt, and in fact the American government does not appear to have contested this right. It is a right inherent in the sovereignty of every country and if exercised without arbitrariness in time of war with a view to preventing an enemy from profiting by such trade, neutrals have no just ground for complaint.<sup>1</sup> The American protest was based mainly on the alleged arbitrariness with which the British "black list" had been prepared, the unnecessary interferences with legitimate trade to which the enforcement of such a policy would inevitably lead, and its inconsistency with the rules of amity and comity which should characterize the relations of friendly powers. Other features of the measure were objectionable, but as stated above, the general principle of law on which the measure was based was not and could hardly be contested. Public opinion in neutral countries generally condemned the British measure not so much on grounds of illegality as upon considerations of expediency, tact, and good neighborliness.<sup>2</sup> The irritation which it occasioned and the injury to legitimate neutral trade, it was said, greatly outweighed any possible advantage which Great Britain could derive from cutting off a relatively insignificant volume of trade between the "black-listed" persons or houses and the enemy.

<sup>1</sup> Cf. the London weekly *Times*, of November 17, 1916.

<sup>2</sup> Cf. an editorial in the New York *Times* of July 20, 1916, where the British "black-list" measure is characterized as "quite the most tactless, foolish and unnecessary act of the British government during the war."



There was considerable popular demand in the United States for the adoption of retaliatory measures against Great Britain, and the Revenue Act of September 8, 1916, conferred authority on the President to prohibit or restrict by proclamation the importation into the United States of goods from any country which during the existence of war should prohibit similar importations thereinto from the United States. The authority conferred, however, was never exercised.

§ 161. **The United States as a Belligerent Adopted the British Policy.** As a neutral the United States had protested against the British policy, but when it became a belligerent in 1917, it did not hesitate to adopt a similar measure. The Trading with the Enemy Act of October 6, 1917, as has already been pointed out, authorized the President, whenever he should be convinced that the safety of the United States or the successful prosecution of the war required it, to declare by proclamation that other persons, bodies, or classes of individuals than those resident in enemy territory, without regard to where they were resident or engaged in business, should be included within the term "enemy." He might in that event proclaim any person or house of enemy nationality or hostile association in a neutral country to be an enemy. Accordingly in December, 1917, the war trade board, to which the President had delegated the administration of this portion of the act, issued a list of some sixteen hundred persons, firms, and corporations residing in or situated in Latin American countries <sup>1</sup> with whom all persons or firms in the United States were forbidden to trade. It was described as a "list of enemies and allies of enemies, and other persons, firms, corporations, who there is reason to believe have acted directly or indirectly, for, on account of, on behalf of, or for the benefit of enemies and allies of enemies." <sup>2</sup> The names of other persons and firms were added to the list from time to time.

<sup>1</sup> Persons and firms in Latin America were first dealt with because of the large number of German firms in that country which were actually engaged in trading with Germany and rendering her active assistance. Many of them were also charged with financing to a large degree German propaganda activities in the United States.

<sup>2</sup> The first list of sixteen hundred names is printed in the *Official Bulletin* of December 5, 1917, pp. 8 ff. In May, 1918, a new and enlarged list containing the names of some five thousand persons and firms in various neutral countries, including those of Europe as well as of Latin America, was issued. The list is published in the *Official Bulletin* of May 4, 1918, pp. 10 ff.

§ 162. **French Legislation and Practice. The Decree of September 27, 1914.** The decree of September 27, 1914, after reciting that one of the results of a state of war, long admitted by the law of nations, was the interdiction of all trade with the enemy, declared that Germany by her declaration of war had terminated the treaty of Frankfort of 1871 and with it the commercial régime which it had established, and that Austria-Hungary had likewise by her declaration of war broken the treaty of Zurich of 1859 and with it the commercial régime established by the treaty. It further declared that all trade (*commerce*) with the subjects of the Empires of Germany and Austria-Hungary and with *all persons residing within those countries* was forbidden. It was likewise forbidden to the subjects of those powers to engage directly or through intermediary persons (*personnes interposées*) in any trade in the territory of France or the French protectorates. Finally, the decree prohibited the execution of all contracts entered into before the war with the subjects of Austria-Hungary and Germany and with all other persons resident therein.<sup>1</sup> Regarding the status of enemy owners of patents and trade-marks granted by the French government as well as of life and workingmen's insurance companies having their situs in Germany and Austria-Hungary, the decree stated that they would be later dealt with by special decrees.<sup>2</sup> Frenchmen who held policies in German or Austro-Hungarian life-insurance companies, which had been taken out before the war, could pay their premiums to the administrator-

<sup>1</sup> French legislation in respect to contracts with the enemy is considered more at length in the foregoing chapter of this work.

<sup>2</sup> Text in Clunet, 1915, pp. 104-107; Théry and King, "Emergency Legislation in France," 59 *Solicitors' Journal*, and Reulos, *Manuel des Séquestres*, pp. 11-13. By a circular of October 30, 1914, the minister of justice explained the meaning of the decree of September 27. It not only prohibited, he said, all trade with persons in Germany and Austria-Hungary, the entering into contracts with persons in those Empires, and the execution of anterior contracts with all such persons when the result would inure to their benefit, but it forbade all payments to German and Austro-Hungarian houses for goods sold or delivered by them prior to the outbreak of the war to Frenchmen or persons residing in France. Payments, however, might be made to the administrator-sequestrators of their branch houses in France, or in case no sequestrator had been appointed, to the *Caisse des dépôts et consignations*. The Chamber of Deputies passed a bill embodying substantially the terms of the decree; it was passed in amended form by the Senate, but apparently the two chambers never reached an agreement in regard to the differences, and hence the bill never became a law. Cf. the text of the bill in Reulos, pp. 42-43.

sequestrator and receive from him payments due. Premiums, however, could not be paid directly or through intermediary agencies to the office in Germany or Austria-Hungary.<sup>1</sup> By an Act of Parliament of April 4, 1915, penalties were prescribed for violation of the decree.<sup>2</sup>

§ 163. **Judicial Interpretation of the Decree.** The French courts were called on in numerous cases to interpret the meaning of the provisions of the decree of September 27, and their decisions were not always in harmony. One of the earliest questions to arise was whether a Frenchman could trade with an enemy subject residing in France and to whom a *permis de séjour* had been issued. The minister of justice, to whom this question was addressed by a member of Parliament on December 8, 1915, replied that the answer depended on the circumstances of the particular case, and therefore no general answer could be given.<sup>3</sup> The laws and decrees did not expressly recognize such a right, but the *parquet* was of course free to abstain from prosecuting Frenchmen for engaging in trade with such persons, and it appears that such trade was in fact allowed.<sup>4</sup> The court of Caen in fact held that it was lawful to trade with an Austro-Hungarian subject who had received a *permis de séjour* and whose property had been sequestrated.<sup>5</sup> The question was also early raised as to whether it was lawful for a French landlord to receive rent from an alien enemy who was the occupier of a house owned by such landlord, and the question was decided in the affirmative.<sup>6</sup> There was much doubt at first whether a Frenchman could lawfully accept and cash coupons of enemy securities or in any manner deal with such property, and the tribunal of Lyons adopted the negative view.<sup>7</sup> The handling of such securities, it admitted, might be of advantage to French

<sup>1</sup> For a discussion of this point cf. Clunet, 1915, pp. 1225-1226. For the status of enemy subjects insured in French companies cf. *ibid.*, pp. 150 ff. It was held that French companies in which persons of enemy nationality held policies issued prior to September 27, 1914, might receive premiums from such enemy subjects, but they could not pay the amount of policies due to such persons.

<sup>2</sup> This law is interpreted and explained in Clunet, 1916, pp. 818-819, and by Schweitzer, *L'Interdiction du Commerce avec l'Ennemi*, ch. V.

<sup>3</sup> Clunet, 1915, p. 115.

<sup>4</sup> Cf. Reulos, p. 272.

<sup>5</sup> Clunet, 1915, p. 1155.

<sup>6</sup> *Ibid.*, 1916, p. 818.

<sup>7</sup> Other tribunals adopted the same view. Reulos, p. 281.

business men, but the effect would be to contribute to the maintenance of the enemy's credit. A French banker, therefore, who accepted, paid, or cashed coupons, checks, or other instruments of credit issued by the enemy for the payment of dividends, interests, and the like was guilty of trading with the enemy.<sup>1</sup> In accordance with the French rule, which makes nationality the test of enemy character, it was held that a trader, the subject of a neutral power, who in France engaged directly or indirectly in trade with an enemy subject, wherever the latter resided, was guilty of violating the decree. Thus a Swiss citizen residing in Paris was fined for trading with a German house in Shanghai, through the medium of a house in Italy.<sup>2</sup> Likewise the subject of an allied power who in France purchased the securities of an enemy country through the agency of a bank established in a neutral country violated the terms of the decree of September 27.<sup>3</sup> Even the sending through the French post-office of Belgian postage stamps to an Austro-Hungarian subject at Luzerne was held to be trading with the enemy.<sup>4</sup> Likewise a Swiss who knowingly transmitted across French territory business correspondence destined to an enemy house in Germany was guilty of violating the decree.<sup>5</sup> So a Parisian haberdasher was sentenced to two years imprisonment for having sold certain articles used in the first communion, to a German house, through the agency of a Swiss house.<sup>6</sup> And a Frenchman who addressed a letter to a German subject in Switzerland offering to send him certain goods was convicted of trading with the enemy and was fined 10,000 francs and deprived of his civil rights for a period of ten years.<sup>7</sup> A naturalized Frenchman of German origin was condemned to pay a fine of 20,000 francs and to suffer the loss of his civil rights for ten years for sending goods to a merchant at Basel with the intention that they should be reforwarded to Germany.<sup>8</sup> But sale by a subject of a neutral country to a Frenchman of goods purchased by him of an enemy subject if the former was not acting as an intermediary or

<sup>1</sup> *Ibid.*, p. 1222.

<sup>4</sup> *Ibid.*, p. 164.

<sup>7</sup> *Ibid.*, p. 1060.

<sup>2</sup> *Ibid.*, p. 571.

<sup>5</sup> *Ibid.*, p. 900.

<sup>3</sup> *Ibid.*, p. 573.

<sup>6</sup> *Ibid.*, p. 617.

<sup>8</sup> *Ibid.*, p. 1062. Trading with Germany through the medium of Swiss houses appears to have been common, but the courts dealt severely with persons convicted of engaging in this traffic. Thus the tribunal of Louhans imposed heavy fines and imprisonment on four Frenchmen for exporting poultry to persons in

representative of the latter, was not trading with the enemy.<sup>1</sup> Nor was the sending of goods by a French merchant to a Dutch agent into Belgian territory under the occupation of the enemy.<sup>2</sup>

§ 164. **German Policy — Ordinance of August 10, 1914.** By an ordinance of August 10, 1914, issued in pursuance of a law of August 4 authorizing the *Bundesrath* to adopt measures in respect to trade and intercourse with the enemy, notice was given that in consequence of the war all commercial treaties between Germany and enemy countries were abrogated and that all customs arrangements resulting from the "most favored nation" clause should be suspended.<sup>3</sup>

§ 165. **Ordinance of September 30, 1914.** By an ordinance of September 30, 1914, issued in retaliation against Great Britain, all payments to persons domiciled or resident in the British Empire, directly or indirectly, by means of cash, bills of exchange, checks, or otherwise, and the transmission to such persons of securities or funds were forbidden, but the Chancellor was authorized to make exceptions.<sup>4</sup> All actions and the prosecution of all claims by individuals or juristic persons having their domicile in the British Empire were suspended from July 31, and no interest was to be allowed thereon during the period of suspension. Debtors to British subjects were authorized to deposit the sums due such persons in the *Reichs-*

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Switzerland who, it was known, intended to reexport it to Germany. Clunet, 1915, p. 995. Cf. the reports of other similar cases, *ibid.*, p. 995; 1916, pp. 150, 161. The Swiss government took steps to prevent the practice of German houses in Switzerland of making use of Swiss names, under cover of which they acted, as intermediaries of trade between France and Germany. Clunet, 1917, p. 143.

<sup>1</sup> 46 Clunet, 252.

<sup>2</sup> *Ibid.*, 254.

<sup>3</sup> The laws and ordinances of the German Empire relating to trade with the enemy may be found in the collection entitled *Kriegsnotgesetze* referred to above. The more important of them may be found in French in Reulos, *Manuel des Séquestres*, pp. 478 ff. Some of the legislation is analyzed by Chas. H. Huberich in the *London Solicitors' Journal*, Vol. 59, pp. 22, 39, 40, 55, and 80, and in *International Law Notes* for January, 1917, pp. 5 ff. German legislation and policy in general are reviewed by Theo. H. Thiesing, of the Library of Congress, in a paper entitled "Trading with the Enemy," published as a senate document (65th Cong., No. 107, 1917).

<sup>4</sup> It was expressly declared that the prohibition in respect to payments was not intended to extinguish the rights of enemy creditors, but only to suspend them.

*bank* in discharge of their obligations. A term of imprisonment not exceeding three years and a fine not exceeding 50,000 marks were prescribed as the penalty for violation of the terms of the ordinance. The Chancellor was authorized to extend the provisions of the ordinance by way of reprisal to other enemy States, and they were so extended by decrees issued from time to time. It will be noticed that the ordinance did not prohibit payments to enemy persons in neutral countries, nor the performance of contracts not requiring remittances of money. While article 1 of the ordinance of September 30 prohibited generally payments to all persons resident in enemy territory, article 5 made an exception in the case of branch houses in Germany of enemy firms in so far as the claims arose in connection with such branch houses.

Doubts having arisen as to what transactions of this kind were intended, an ordinance of December 22 was issued to remove all such doubts. By an ordinance of October 13 the transmission of funds necessary for the payment of fees for the maintenance or renewal of patents and trade-marks in enemy countries was authorized, but by an ordinance of December 28, 1916, this privilege was restricted to German, allied, or neutral subjects. British and French nationals residing in Germany could not, therefore, make payments of this kind.<sup>1</sup>

§ 166. Judicial Interpretation. German legislation was far less elaborate than that of either Great Britain or France and, it may be added, was less rigorous. Among the decisions reported are the following: It was held to be unlawful for a Frenchman residing in Germany to receive the amount of a debt due him from a Frenchman residing abroad.<sup>2</sup> A German copartner of a commercial firm in Chili could not instruct his Chilian house to pay a debt in England.<sup>3</sup> The impossibility of paying a debt in an enemy country was no obstacle to the pronouncing of a judgment against one charged with the attempt.<sup>4</sup> A German employer of a Russian clerk could not refuse to pay the wages due the clerk, on the pretext that the ultimate destination of the sum might inure to the benefit of the enemy.<sup>5</sup> All pay-

<sup>1</sup> Huberich, *London Solicitors' Journal*, Vol. 59, p. 46, and Vol. 61, p. 180; also his *Trading with the Enemy*, pp. 14-18.

<sup>2</sup> Soergel, *Kriegsrechtssprechung und Kriegsrechtslehre*, p. 116.

<sup>3</sup> *Ibid.*, No. 3.

<sup>4</sup> *Ibid.*, No. 2.

<sup>5</sup> *Ibid.*, No. 59.

ments, directly or indirectly, to persons in enemy territory being prohibited, a person domiciled in Germany could not lawfully attempt to pay a French creditor by sending a check to a Dutch house for transmission to France.<sup>1</sup>

§ 167. **Character of German Legislation.** The general rule of continental law being that trade with the enemy is lawful except in so far as it is expressly prohibited, and since the ordinances referred to above prohibited in the main only payments and remittances of funds and securities,<sup>2</sup> a considerable freedom of trade with the enemy was left untouched. For obvious reasons, however, the benefit to Germany from such trade greatly outweighed the possible injury, and this may account for the freedom which the German legislation allowed. It does not appear that the view put forward by the English courts in the cases cited above, that the effect of the war was to interdict not only trade but all intercourse of whatsoever character, was advanced in Germany.

<sup>1</sup> Decision of the *Reichsgericht*, March, 1916.

<sup>2</sup> As to the liberality of German policy, cf. Huberich, *Trading with the Enemy*, p. 15.



## CHAPTER IX

### *EFFECT OF WAR ON CONTRACTS AND PARTNERSHIPS*

§ 168. The General Anglo-American Doctrine; § 169. Doctrine as to Antebellum Contracts; § 170. The Law as to Contracts of Partnership; § 171. Shares and Debentures; § 172. Effect of War on Public Debts Due Enemy Aliens; § 173. French Law and Practice; § 174. German Theory and Practice.

§ 168. **The General Anglo-American Doctrine.** The general rule of English and American law is that contracts made with enemy subjects *during* war, and especially those the execution of which involves trading with the enemy, are illegal and void.<sup>1</sup> The common law, however, made a distinction between contracting and trading with the enemy. Transactions of the former kind might, under certain conditions, be legal, whereas the latter were never legal, except of course where the trader had a license. But this distinction was never recognized by some English jurists, nor was it recognized by the British trading with the enemy legislation of the recent war, nor by the British courts, which uniformly held that *all* intercourse, and not merely commercial relations with the enemy, is unlawful.<sup>2</sup> Contracts of

<sup>1</sup> A learned discussion of the effect of war on contracts may be found in *Naylor Benson and Co. v. Krainische Gesellschaft*, 1 K. B. 331 (1918). See also Leslie Scott, "Effect of War on Contracts," *International Law Association Reports*, 1913, pp. 155 ff., who remarks that the rule of invalidity applies to all contracts and not merely to those involving commerce with the enemy. "Help to the enemy," says the author, "is the touchstone of illegality. Our courts regard as helpful to the enemy every such contract made during the war; the presumption is irrebuttable, a rule of law. In the case of contracts made *before* the war, our courts permit of discrimination; if the contract is helpful to the enemy, the fact avoids it; if the contract is helpful, its legal enforceability is merely suspended except where suspension of itself involves dissolution." Cf. also Chitty, *Commercial Law*, Vol. I, p. 377, and Blackstone, *Commentaries*, Vol. II, pp. 67-68. American case law is analyzed by Mr. Chas. Warren, assistant attorney-general of the United States, in Sen. Doc. No. 111, 65th Cong., 1st Ses., and by Huberich, *Trading with the Enemy*, pp. 110ff.

<sup>2</sup> Dr. Sieveking, a German jurist, criticises the Anglo-American doctrine as one which is based on historical considerations rather than upon reasons of sound public policy. He admits that all trade with the enemy, when the effect is to

necessity, however, drawn by a prisoner of war during hostilities, such for example as bills of exchange for his own subsistence, are held to be valid and may be sued upon after the return of peace.<sup>1</sup> Whether contracts of a non-commercial

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inure to his benefit, should be prohibited, but he holds that contracts made *before* or *during* the war should be treated as valid, with the single exception of agreements entered into with the design of aiding the enemy. On the other hand, those the execution of which would unintentionally increase the resources of the enemy should only be suspended until the end of the war. "There is no earthly reason," he asserts, "why a subject of one of the belligerents should not be allowed to appear in the courts of the nation to obtain a judgment provided execution, unless out of funds in the enemy's country, be stayed until the termination of the war." Marine and fire insurance policies should be treated as void only as regards loss by capture by the cruisers of the country with which the insured is identified and should be paid at the end of the war. Life-insurance policies, however, since they are usually for the benefit of widows and orphans, should not be affected. So contracts for the delivery of goods should only be suspended when the sending of the goods would result in the strengthening of the resources of the enemy. Payments of bills of exchange should or should not be allowed, depending on the circumstances. Interest, annuities, and the like should not, however, be paid until the end of the war. See his paper, "Influence of War on Private Contracts," *International Law Association Reports*, 1913, pp. 169 ff. Dr. B. C. J. Loder, judge of the Netherlands Supreme Court, commenting on Dr. Sieveking's paper, remarks that Great Britain and the United States are the only countries in which practically all contracts made with enemy aliens during war are treated as illegal. He agrees with Dr. Sieveking that the Anglo-American rule is unnecessarily rigorous (*ibid.*, p. 186). Judge C. G. Phillimore admits that Dr. Sieveking's suggestions offer "a solution which is in accordance with the modern conceptions of international commercial relations and politics." *Journal of Comp. Leg.*, January, 1915, p. 35. Cf. also De Visscher in the *Law Quarterly Review* for July, 1915, pp. 289-298. Baty, a well-known English authority, likewise criticises the rigor of the Anglo-American doctrine that virtually all contracts with the enemy should be dissolved. There is no reason, for example, he says, why a contract with an enemy alien for the painting of a historical canvas, the execution of which is incomplete at the outbreak of the war, should be terminated by war. The conclusion would appear to be, says Baty, that except in peculiar cases where the interest and duty of a private individual would be brought into conflict and where personal intercourse is still necessary, the prohibition of making and performing contracts with enemy persons is no longer, as a matter of policy, reasonable or maintainable. "Intercourse with Alien Enemies," *Law Quarterly Review*, January, 1915, p. 49. Dr. Schuster likewise combats the Anglo-American doctrine and asserts that it is out of harmony with modern conditions. For a German criticism of the Anglo-American doctrine cf. Strupp, *Zeitschrift für Völkerrecht*, Vol. 8, pp. 56 ff. Strupp says the Anglo-American doctrine is not in accord with Rousseau's theory of war, with continental theory or practice, nor with article 23 (k) of the Hague convention respecting the laws and customs of war discussed in a former chapter of this book.

<sup>1</sup> Trotter, *Effect of War on Contracts* (1915), p. 22. Cf. also Page, *War and Alien Enemies*, pp. 34 ff., and Schuster, *Effect of War and Moratorium on Commercial Transactions*, ch. 5.

character, entered into during the war, are valid is arguable. In fact, the English Trading with the Enemy Act prohibited "any contract, agreement or obligation" with the enemy,<sup>1</sup> and the dicta in most of the actual decisions were broad enough to cover all contracts, commercial or otherwise. But under the British proclamations contracts with enemy aliens having a civil or commercial domicile in England, subject to certain exceptions, were not regarded as contracts with the enemy and might be enforced by a suit at the instance of the enemy alien party, if he had an express or implied license to remain in the United Kingdom.<sup>2</sup> But contracts made in furtherance of illegal trading, even though not made between citizens or subjects of two opposing belligerent powers, are illegal and void.<sup>3</sup>

§ 169. **Doctrine as to Ante-bellum Contracts.** As to executory contracts entered into before the outbreak of war with subjects of an enemy State or persons resident therein their validity or invalidity depends upon a variety of circumstances. Some are considered as dissolved; others are rendered unenforceable for the time; others, still, remain unaffected. The general rule is that war does not *ipso facto* terminate such contracts, but merely suspends the rights of the parties; that is to say, they cannot sue on them until the return of peace.<sup>4</sup> But

<sup>1</sup> An English court in the case of *Schaffenius v. Goldberg*, 1 K. B. 284 (1916), seems to have assumed that there were certain contracts which might be thus entered into, for it declared that any contract not expressly prohibited by the Trading with the Enemy Act was valid and was not affected by the internment of the enemy partner as a civilian prisoner.

<sup>2</sup> *Ingle v. Mannheim Cont. Ins. Co.*, 112 L. T. R., p. 510 (1915), and *Porter v. Freudenberg*, 112 L. T. R., p. 313. Cf. also Campbell, *The Law of War and Contract*, p. 130.

<sup>3</sup> Trotter, *op. cit.*, p. 7. Cf. also Page, ch. 6, and Schuster, ch. 5.

<sup>4</sup> *Janson v. Dreifontein Consolidated Gold Mines Co. Ltd.*, 1902, A. C. 484, Cobbett's Cases, p. 62. Cf. also Schuster, who remarks that it is not correct to say, as is often said, that *all* executory contracts are *ipso facto* cancelled by the outbreak of war between the parties. The case of *Griswold v. Waddington*, which is usually relied upon as authority for this contention, does not lay down any such general principle, nor did the United States Supreme Court in the case of *New York Life Insurance Co. v. Statham* (93 U. S. 24). Cf. also the American cases of *Hanger v. Abbott* (6 Wall, 532); *U. S. v. Lane* (8 Wall, 195); *U. S. v. Lapens* (84 U. S. 601), and *Insurance Co. v. Davis* (95 U. S. 425). In this latter case exception is made of ransom contracts, contracts of necessity, and those for the payment of debts to an agent of an enemy alien where the agent resides in the same country with the debtor. But the last-mentioned exception is subject to restriction. In the *Lapens* case the U. S. Supreme Court said: "All contracts with the subjects or in the territory of the enemy, whether made directly by one

a British subject may enforce performance during the war, and if the alien enemy party is in England under license, he may likewise sue on it during the war. But contracts entered into *before* the outbreak of war, if the performance of the stipulations would inure to the benefit of the enemy or would involve trading with him, are dissolved and not merely suspended.<sup>1</sup> Likewise they are dissolved if they are of such a nature as to be incapable of suspension, e.g., where the performance of the stipulations necessitates intercourse with the enemy, or where time is the essence of the contract, or where the parties would not at the conclusion of peace be left on a footing of equality; for the doctrine of the revival of contracts suspended by war is founded on considerations of equity and justice.<sup>2</sup>

The decisions of the English courts during the recent war were in general in harmony with the traditional Anglo-American doctrine thus outlined. Thus it was held that a contract entered into before the war was dissolved where the performance would have involved trading with the enemy.<sup>3</sup> But if performance was lawful, the contract was not affected.<sup>4</sup> Therefore an ante-bellum contract between an English company and an enemy company whose property had been placed in the hands of a custodian remained unaffected and was enforceable by suit;<sup>5</sup> so was a contract between a British subject and a German who was subsequently interned as a civilian prisoner in England.<sup>6</sup> Likewise a contract between an English firm and a German company registered in England was only suspended for the

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person, or indirectly through an agent, who is neutral, are illegal and void. This principle is now too well settled to justify discussion. No property passes and no rights are required under such contracts." The holding of the court in the *N. Y. Life Insurance* case that executory contracts in which *time is the essence* are terminated, leaves the inference that not all executory contracts are cancelled.

<sup>1</sup> *Furtado v. Rogers*, 3 Bos. and R., p. 191 (1902), and *Esposito v. Bowden*, 7 Ellis and Blackburn, 763 (1857). The latter is the leading English case on this subject. Other cases are cited by Evans, *Cases on International Law*, p. 263, and Huberich, *Trading with the Enemy*, p. 263, where the case law is analyzed.

<sup>2</sup> Trotter, p. 46.

<sup>3</sup> *Duncan Fox & Co. v. Schrempf and Bonke*, 3 K. B. 355 (1915); *Andrew Miller & Co.*, 1 K. B. 402 (1916); *Scotland v. So. Afr. Ters. Ltd.*, 142 L. T. 366 (1917).

<sup>4</sup> *Smith and Barrett v. Becker Gray and Co.*, 112 L. T. 914 (1916).

<sup>5</sup> *In re Aktien-Gesellschaft* (No. 2), 32 L. T. R. 695 (1916).

<sup>6</sup> *Schaffenius v. Goldberg*, 1 K. B. 284 (1915).

period of the war.<sup>1</sup> Regarding negotiable instruments and bills of exchange the rule of English law is that where they are made before the outbreak of war between parties divided by the "line of war," they are unenforceable by an enemy alien during the war, but the remedy revives upon the return of peace.<sup>2</sup> In the case of *Haarflicher v. Baerselmann*<sup>3</sup> it was held that when a bill was drawn by merchants in Petrograd on a British firm, who accepted it, and was payable to the order of a Hamburg merchant, who endorsed it, the British firm could not refuse payment to the holders, a firm of bill discounters in London, on the ground that it was endorsed by an enemy alien. The Trading with the Enemy Amendment Act provided that no person should by virtue of any transfer of a bill of exchange or promissory note made or to be made in his favor by or on behalf of an enemy, whether for valuable consideration or otherwise, have any rights or remedies against any party to the instrument unless he proved that the transfer was made before the commencement of the war, and any party to the instrument who knowingly discharged it should be deemed guilty of trading with the enemy. But this provision did not apply where the transfer was made before November 19, 1914, in good faith and for valuable consideration.<sup>4</sup> In the case of *Seligman v. Eagle Insurance Company* the question was presented to the chancery division as to the status of life-insurance policies issued by a British company prior to the outbreak of the war to the plaintiff who subsequently became an enemy alien. After the outbreak of the war the plaintiff tendered the premium due, and it was accepted by the company. Subsequently, having borrowed money from the company, he tendered the amount due the company and demanded the delivery of the policy, which the company then held as security; but the company refused to deliver it except upon certain conditions. He thereupon brought

<sup>1</sup> *Elders and Fyffes v. Hamburg-Amerikanische Paketfahrt Aktien Gesellschaft*. In this case the court refused to apply the doctrine of the House of Lords in the *Continental Tyre and Rubber Co.*, that foreign control makes a foreign company in such a way as to deprive a company registered in England of its status as an English company, but held that the company in question was both an English and a foreign company. *Solicitors' Journal*, Vol. 61, p. 729.

<sup>2</sup> See Cobbett's Cases, II, 87; cf. also the proclamation of September 9, 1914.

<sup>3</sup> *Law Times*, October 4, 1914.

<sup>4</sup> Trotter, p. 53.

an action for a declaration that the policy was a valid and subsisting policy and that he was entitled to its assignment. The court held that there was nothing in the nature of the contract to put an end to it on the outbreak of war, and that mere receipt of the premiums by the company was not unlawful intercourse with the enemy, as the result of payment of the premiums was that the enemy alien himself gained nothing while he was an alien enemy, as his rights as policyholder were clearly suspended during the war; therefore the company was bound to hand over the securities to the plaintiff without any reservation upon payment by him of the debt, and the limitations to the assignment which were insisted on by the company were not justified.<sup>1</sup> In the case of *Zinc Corporation v. Skipworth* the court of appeal held that a contract between a British subject and a German subject entered into before the war and containing a clause to the effect that the obligation should be suspended on account of inability to perform the stipulations resulting from strikes, acts of God, *force majeure*, etc., was not dissolved by the outbreak of war but only suspended during the continuance of the war.<sup>2</sup> But in the case of *Zinc Corporation v. Hirsch*<sup>3</sup> a contract between an English and a German company carrying on business in Germany, under which the defendants agreed to buy from the plaintiffs a certain quantity of zinc concentrates

<sup>1</sup> 142 L. T. p. 296 (1917), 1 ch. 519. What was the status of policies insuring against the restraint of princes? The House of Lords held that the declaration of war making illegal the voyage of a British ship to Germany was such a restraint and that the owners of goods on such a ship could recover. (Sandy's case, 1 A. C. 650 (1916).) But where goods were put on a German ship and the master ran into a neutral port to avoid capture, the House of Lords held that the loss was not due to restraint of princes and that the owner of the goods could not recover. Becker's case, A. C. 1917.

<sup>2</sup> 31 L. T. R. 106 (1916). Cf. also the somewhat similar American case of *Dauids v. Hoffman Chem. Works*, 166 N. Y. Supp. 179 (1917). Many German and some French contracts contained provisions that, in case of a European war, performance should be suspended for the duration of the war. One party was therefore tied in his operations by the knowledge that after the war he would have to provide for these contracts. The other party, on the other hand, had an asset in them upon the return of peace since he could insist upon performance. On these considerations the English court of appeal and the House of Lords held such contracts to be dissolved by the war, because their enforcement would tend to assist the enemy. Such were the contracts of the Rio Tinto Company, under which certain British firms undertook to supply copper ore to certain German firms over a long term of years. *Ertel Bieber and Co. v. Rio Tinto Co.*, A. C. 260 (1918).

<sup>3</sup> 32 L. T. R. 7 (1914), 1 K. B. 541.

and which stipulated that, in the event of any cause beyond the control of either party preventing the execution of the terms of the agreement, the contract should be suspended during the continuance of such disability, was held to be dissolved.<sup>1</sup> Upon appeal this decision was affirmed.

"To recognize such a contract during war," said Mr. Justice Swinfen, "and to give effect to it by holding that it remained legally binding upon the contracting parties would be to defeat the object of this country in crippling the commerce of the enemy. It would be to undo by means of British tribunals the work done for the British nation by its naval or military forces."

In the case of *London and Northern Estates Co. v. Schlesinger*<sup>2</sup> the king's bench division held that the lease of a house, made before the outbreak of war to a German subject, was not extinguished by the outbreak of war, notwithstanding the fact that the lessee was prohibited from residing in the area in which the house was situated. The defendant pleaded that the alien restrictions order, which made it unlawful for him to occupy the house, put an end to the tenancy and released him from the obligation to pay rent. But the court held that the right to personal occupation of the premises was not the foundation of the contract; moreover, performance had not been rendered impossible by the alien restrictions order, because the defendant had a right under the contract to assign or sublet the house. The cases of *Arnhold Karberg and Co. v. Blythe and Co.*, and *Schneider & Co. v. Burgett and Newsam*<sup>3</sup> involved the validity of a contract of affreightment. Certain goods were sold under a c. f. i. contract before the outbreak of the war and were to be shipped in a German vessel from China to Naples, both the buyers and sellers being English. The price was to include freight and insurance and was to be paid in London on arrival of the goods. After the outbreak of the war the ship took refuge in a neutral port, after which the sellers sought to recover on tender of the German bill of lading and the policy of insurance.

<sup>1</sup> There was strong criticism of this decision in Germany. Since the contract itself provided for its suspension in case of *force majeure*, the decision of the court that it was dissolved was a violation of the contract. Cf. the *Norddeutsche Allgemeine Zeitung* of January 20, 1916.

<sup>2</sup> 1 K. B. 20 (1916). Cf. also *Halsey v. Lowenfeld*, 2 K. B. 707 (1916).

<sup>3</sup> 1 K. B. 495 (1916). Cf. also the case of *Duncan Fox & Co. v. Schrempff & Bonke*, 3 K. B. 355 (1915).



The buyers pleaded that the contract was void, or, if not, its performance would involve trading with the enemy. The court relied for its decision mainly on the case of *Esposito v. Bowden*, where it was said that contracts of affreightment made before the war, but which remained unexecuted, unlawful, or impossible, were dissolved. Reliance was also had on the decision in *Janson v. Dreifontein*, where it was said that war prohibits all trading with the enemy except with the royal license and dissolves all contracts which involve such trading except as to claims having accrued before the war under a contract, as in the case of loss on a policy of insurance, in which case the contract would not be dissolved but merely suspended. In the light of these decisions the court held that the contract of affreightment and the policy of insurance became void by the outbreak of the war except as regards claims already accrued, if any, and even these could not be enforced during the war.

Among contracts which are undoubtedly dissolved by war are marine insurance policies covering enemy property against risk of capture by ships flying the flag of the country in which the policy is issued.<sup>1</sup> Regarding other insurance contracts there is no good reason why they should automatically be terminated by the outbreak of war, although on account of the prohibition of intercourse the policy might become void as soon as the benefit of the last payment expires. This would be true of life-insurance policies, but insurance companies usually carry on business in foreign countries through resident agents to whom payments of premiums may be made. The common law rule was modified by the proclamation of September 9, which prohibited the acceptance of new risks and the payment of losses; but the validity of contracts involving risks incurred before the outbreak of war was not affected. Payments arising out of contracts entered into before the outbreak of war are permitted, and it would therefore seem that a British company could lawfully receive from an enemy policyholder premiums on pending life or fire insurance policies as they fall due.<sup>2</sup>

<sup>1</sup> Cf. Schuster, p. 27, for the citation of the authorities; Huberich, *op. cit.*, pp. 291 ff., and Campbell, *op. cit.*, pp. 235 ff.

<sup>2</sup> Schuster, p. 31; also *Ingle v. Mannheim Continental Insurance Co.*, 112, L. T. R. 510 (1915). The decisions as to life-insurance contracts are examined by Huberich, *op. cit.*, pp. 293 ff., and Campbell, *op. cit.*, pp. 191 ff.

In the case of *Tingley v. Müller*<sup>1</sup> the question of the validity of a contract made before the war by an Englishman who had been given a power of attorney to sell a house by a German before returning to Germany and thus becoming an enemy alien, was presented to the court of appeal. The court held that the contract did not involve intercourse with the enemy and must therefore stand. The decision appears to have been logical, but it created a loophole by permitting enemy trading through the agency of attorneys and trustees. The weight of authority seems to be in favor of the view that where the contract of agency is not of such a nature as to require intercourse with the enemy or is not inequitable to either party, the agent may perform all duties devolving upon him except in so far as they may be forbidden.

As has been said, contracts entered into with enemy subjects *after* the outbreak of war are generally dissolved and not merely suspended. They are therefore illegal *ab initio*, subject to the few exceptions mentioned above.<sup>2</sup> Concerning the question whether a contract, the enforcement of which is suspended, may become barred under the statute of limitations during the continuance of the war there is a difference of opinion. Some writers hold the affirmative view,<sup>3</sup> others the negative.<sup>4</sup> The latter view seems to be most in favor. Apparently no cases involving this question arose during the recent war.

§ 170. **The Law as to Contracts of Partnership.** As to partnerships between enemy persons the general rule of English and American law is that they are *ipso facto* dissolved by the outbreak of war.<sup>5</sup> This view seems to be based on the assump-

<sup>1</sup> 2 Ch. 144 (1917). This important case is discussed by Campbell, *op. cit.*, pp. 235 ff.

<sup>2</sup> Cf. especially the American case of *Hanger v. Abbott* (6 Wall, 532), 1867.

<sup>3</sup> For example, Anson on *Contracts*, 13th ed., p. 129, and Lord Lindley on *Company Law*, 6th ed., p. 53.

<sup>4</sup> For example, Westlake, *International Law*, Vol. II, p. 49, and Pollock, *Law of Contracts*, 8th ed., p. 86. Chadwick in the *Law Qu. Rev.*, Vol. 20, p. 167, thinks the English courts would hold that the statute of limitations does not run during war. The American Trading with the Enemy Act provided that the statute should be suspended with reference to rights and remedies on any contract obligation entered into prior to the war between parties neither of whom was an enemy and containing promises to pay.

<sup>5</sup> The leading early cases are *Griswold v. Waddington*, 16 Johns 438, decided by Chancellor Kent in 1818, and *Esposito v. Bowden*, 7 E. and B. 763, decided by the queen's bench division in 1857. Cf. also the American case of *Hanger v. Abbott*, 6 Wall, 532 (1867). The case law is fully reviewed in Huberich, *op. cit.*,

tion that a partnership agreement predicates intercourse between the partners which is itself made unlawful by the outbreak of war; and since the members are prohibited from communicating with each other, it would be inequitable to treat the partnership as continuing to exist.<sup>1</sup> The question appears to have been raised for the first time during the recent war in the case of *Armitage and Batty v. Borgmann* upon the application by two English partners of a firm composed of themselves and two German partners, for the appointment of a receiver in accordance with § 3 of the Trading with the Enemy Act. Counsel contended that the partnership was dissolved, even admitting that certain contracts are only suspended by war. Inasmuch, however, as nothing more than the appointment of a receiver was asked for, the court did not consider it necessary to decide the question whether the partnership had been put an end to by the war.<sup>2</sup> The question was definitely disposed of by the court of appeal in the case of *Rex v. Kupfer* in August, 1915.<sup>3</sup>

pp. 278 ff. "It appears to me," said Kent, "that the declaration of war did not itself work a dissolution of all commercial partnerships existing at the time between British subjects and American subjects." But as Schuster (*op. cit.*, p. 21) points out, Chancellor Kent's remarks were in reality *obiter dicta*, for the partnership in question had already been dissolved before the outbreak of the war, and his assumption, therefore, that the outbreak of the war dissolved it, was unnecessary to the decision. Referring to Hall's statement (*Int. Law*, 6th ed., p. 384) that the effect of war is to dissolve partnerships between alien enemies, "since it is impossible for partners to take up their joint business on the conclusion of war at precisely the point where it was abandoned at its commencement," Schuster remarks that this is no reason for holding a partnership to be dissolved. "Why," he asks, "would it not be sufficient to adjust matters in the best possible way after the end of the war? The winding up of the affairs of the partnership could not in any case take place before that period and on its arrival the reason for its dissolution would have disappeared. It would therefore be more natural to say that a partnership agreement with an alien enemy is like other agreements, suspended during the war in so far as it involves intercourse with such alien enemy, but that it becomes fully operative after the termination of the war unless it has in the meantime expired by lapse of time." Cf. also Leslie Scott, *Int. Law Assoc. Repts.*, 1913, pp. 155 ff., and Phillipson, *Effect of War on Contracts*, p. 55. A partnership between a British subject and an alien enemy, says Trotter, can hardly continue, since the power of mutual control of the partners cannot continue, because no person can derive any profit from his alien enemy partner, and finally because it might be a serious injury to one of the partners to be compelled to continue the partnership.

<sup>1</sup> But this doctrine applies only to partnerships; it does not extend to the relation existing between coöwners and co-tenants.

<sup>2</sup> *Law Times*, 112: 819 (1914).

<sup>3</sup> 112 L. T. 1138 (1915), 2 K. B. 321.

The case involved the status of a firm composed of three partners all of whom were British subjects, but two of whom were resident in the German Empire and carried on the business there. Although British by nationality, they were by domicile enemy aliens, and trade between the London and Frankfort houses was unlawful. In holding that the partnership was dissolved by the outbreak of the war, Lord Reading stated emphatically that there could be no such thing as a partnership between enemies of Great Britain and British subjects when war has been declared.<sup>1</sup> In the case of *Hugh Stevenson and Sons v. Aktiengesellschaft für Cartonnagen-Industrie*,<sup>2</sup> decided in March, 1916, the king's bench division held that a contract of agency between an English company and a German company, the former of which was the sole agent in England of the latter, was terminated by the outbreak of war and that the defendants were entitled only to such sum in respect of the agency as was due by the plaintiffs to them on the date of the outbreak of the war, August 4, 1914. The performance of the agreement during the war, said the court, necessarily involved commercial intercourse with the enemy, and if such intercourse was not expressly prohibited by the Trading with the Enemy Act and proclamations, it was illegal at common law. The partnership, therefore, was not merely suspended, as contended, by the plaintiffs, but was dissolved. The court adopted and applied the reasoning of Chancellor Kent in *Griswold v. Waddington*, of Justice Willes in *Esposito v. Bowden*, and of the king's bench division in *Zinc Corporation v. Hirsch*.<sup>3</sup> These decisions would seem to settle definitely the question as to the effect of war on contracts of agency, at least where performance involves commercial intercourse, and on commercial partnerships between

<sup>1</sup> 1 K. B. 763 (1916), *Law Times*, 114: 180. Cf. also the comment in the *Solicitors' Journal and Weekly Reporter*, 61: 146.

<sup>2</sup> The British prize court at Alexandria held in the case of the *Derfflinger* (Treher's *Brit. and Col. Prize Cases*, I, 642 (1915)), that a partnership between British and German subjects, organized under English law and carrying on business in China as a German firm under the control of the German consular authorities, was dissolved by the outbreak of the war.

<sup>3</sup> 1 K. B. 842 (1917). Upon appeal (1 K. B. 842) this view was affirmed, but it was held that the enemy partner was entitled to a share of the profits made, after the dissolution, by the English partner carrying on the business with the aid of the enemy partner's share of the capital. Cf. also the case of *Haematite Iron Co. v. Possehl* (1 K. B. 811, 1916), where a contract of sales agency was held to be dissolved.

enemy aliens; but it is not quite clear whether the principle thus laid down would apply to partnerships of a non-commercial character, if there can be any such.<sup>1</sup> No decision on this point appears to have been made.

§ 171. **Shares and Debentures.** Regarding shares and debentures held by enemy aliens in British companies, the general rule of English law is that they are not extinguished by war, but continue to exist like other property rights. To confiscate them, says Westlake, would be "grotesque in its injustice," and in many cases contrary to treaties.<sup>2</sup> Shares owned by enemy aliens in British companies were, therefore, left untouched by the enemy alien legislation of 1914-1916. But dividends or interest could not be paid on them during the war. Upon the return of peace, however, the holders were entitled to accrued dividends, though not interest, for the period during which the debtor was prevented from paying the principal.<sup>3</sup> But while the rights of enemy shareholders are not extinguished, such persons cannot be directors; they cease to be such at the outbreak of war.<sup>4</sup>

<sup>1</sup> Kent in his opinion in *Griswold v. Waddington* spoke only of *commercial* partnerships.

<sup>2</sup> *Int. Law*, II, 53. Cf. also Trotter, *op. cit.*, p. 55, and Schuster, *op. cit.*, p. 25.

<sup>3</sup> This is also the American doctrine and practice. See *Hoare v. Allen*, 2 Dall. 102, and Huberich, *op. cit.*, pp. 238 ff. Some authorities hold that since the rights of shareholders are contractual in character, the outbreak of war ought to abrogate those held by enemy aliens. Cf. Phillipson, *Effect of War on Contracts*, p. 96. But as Schuster (*op. cit.*, p. 25) remarks, there is no authority for this view, and the difficulties that would arise if such a rule were applied are so great that it may be taken for granted that no court will ever apply it. Lord Lindley in *ex parte Boussmaker* appears to have held that a person who is a member of a company and becomes an enemy alien by the outbreak of war does not *ipso facto* cease to be a member, but that his right to recover dividends is suspended until the return of peace. Cf. also his work on *Companies*, 6th ed., p. 53; Page, *War and Alien Enemies*, p. 88, and Bentwich, *War and Private Property*, pp. 60-61. Baty (*Int. Law in South Africa*, p. 94) seems to hold that enemy shareholders cease to be members by the outbreak of war, but that they are entitled to receive the value of their shares. Nevertheless he admits that since they have no *persona standi judicio*, they cannot enforce their claims until the return of peace. Phillipson (*op. cit.*, p. 98), however, points out that Baty's view is based on the rule governing the effect of war on partnerships and does not take into account the difference between companies and partnerships. Baty's view is strongly criticised by Chadwick in an article in the *Law Qu. Rev.*, Vol. 20, pp. 167 ff. Some authorities make a distinction between public and private companies and apply the above-mentioned rule only to the former, but Schuster (p. 26) points out that it would be very difficult in practice to distinguish between the two classes of companies.

<sup>4</sup> *Daimler Co. v. Cont. Tyre and Rubber Co.*, 2 A. C., 307 (1916).

As to whether interest is payable on private debts due to an enemy alien during the period of the war there is no agreement among the authorities. Germany appears to have passed a law during the recent war providing that no interest should be payable by German debtors to creditors residing in Great Britain from the date of maturity until the end of the war. In the case of *Fried Krupp Aktiengesellschaft* Mr. Justice Younger refused to recognize the German ordinance as a part of the general German law or of the law of nations, by which the parties were bound, and denied that it would create in England any disability upon a person against whom its provisions were directed.<sup>1</sup> The weight of American authority is in favor of the view that interest recoverable as damages is abated during the war, and the United States Supreme Court has even held that conventional interest is suspended.<sup>2</sup>

As to the confiscation of private debts themselves it is sometimes said that the right still exists, but all writers are in agreement that it is impolitic, and the right was even emphatically denied by Lord Ellenborough in *Wolff v. Oxholm* (1817). In a recent case a New York court expressed the opinion that "a state of war has never been held to confiscate a debt owing by a resident to a non-resident citizen of an enemy country, although it might suspend the remedy of collection or prohibit the transmission of the proceeds to the enemy country."<sup>3</sup>

§ 172. **Effect of War on Public Debts Due Enemy Aliens.** It is admitted by all authorities that public stocks held by persons of enemy nationality are not confiscable.

"A contract to pay interest to all holders of the national stock or securities should, if a strict application be made of the principle of domicile, be suspended until the conclusion of peace, that is, so far as alien enemies

<sup>1</sup> 2 Ch. 188 (1917). Other English courts held that interest on debts due enemy aliens ran during the war. Cf. the cases cited in Campbell, *op. cit.*, pp. 228 ff.

<sup>2</sup> *Brown v. Hiatt*, 15 Wall, 177 (1872). The decisions are reviewed by Huberich, *op. cit.*, pp. 238 ff. The American Trading with the Enemy Act provided that payment of debts might be made to the alien property custodian. All enemy creditors, therefore, might be regarded as having in a sense a duly appointed agent in the United States to whom payment could be lawfully made, and therefore interest continued to run after the appointment of such custodian. Between April 6, 1917, the date of the declaration of war, and October 6, 1917, the date of the enactment of the law, the liability for interest was determined by the general rules of the common law. Huberich, *op. cit.*, p. 243.

<sup>3</sup> *Rothbarth v. Hersfeld* (1917), 100 Misc. (N. Y.) 470. Cf. also Phillipson, *Effect of War on Contracts*, pp. 38-45.



are concerned. But as national honor and the State's credit are involved, it is conceived that the outbreak of war will not be allowed to interfere with the discharge of such obligations. It has thus become a rule of international law that neither the principal nor the interest of a State debt can be sequestrated or confiscated."<sup>1</sup>

This doctrine was fully established by the case of the *Silesian Loan* of 1752-1756<sup>2</sup> and by the case of the *Russo-Dutch Loan*, which was paid throughout the Crimean war.<sup>3</sup> But this rule does not apply to certain other national obligations, such as annuities due enemy subjects. Thus during the recent war the parliamentary annuity payable to the Grand Duchess of Mecklenburg-Strelitz, aunt of the English queen, was suspended. Where the obligation rests upon treaty stipulations, however, the situation is different. Thus in pursuance of article 12 of a treaty by which Great Britain and Russia agreed to pay an annuity to the Duchess of Coburg, the British government continued throughout the recent war to make the payments, although the late Duke was a German prince. According to Prime Minister Asquith the payments were kept up because the Duke never ceased to be a British subject and because the government was bound by treaty obligations to do so.<sup>4</sup>

§ 173. **French Law and Practice.** As has already been pointed out in the preceding chapter, the decree of September 27, 1914, made a distinction between contracts or obligations entered into between French nationals and subjects of enemy States or other persons residing therein, before the outbreak of the war, and those entered into after the declaration of hostilities. The execution of those belonging in the first category, if performance would inure to the benefit of the enemy, was suspended as being contrary to public policy until a date to be determined after the conclusion of peace. But contracts and obligations entered into prior to the outbreak of the war, the execution of which would not inure to the benefit of the enemy, remained unaffected, and their stipulations might lawfully be

<sup>1</sup> Trotter, *op. cit.*, p. 62; Phillipson, *Effect of War on Contracts*, p. 39, and Hall, *International Law*, 6th ed., p. 431.

<sup>2</sup> De Martens, *Causes Célèbres*, Vol. II, p. 97.

<sup>3</sup> Baty and Morgan, *op. cit.*, p. 554.

<sup>4</sup> Baty and Morgan (*op. cit.*, p. 554), however, remark that the fact of the Duke's never having ceased to be a British subject was irrelevant for the reason that his domicile made him an enemy alien whatever may have been his nationality.



performed, since no object would have been subserved in prohibiting their execution.<sup>1</sup> It will be noted that the decree did not annul any existing contracts, not even those the execution of which would inure to the benefit of the enemy; it went no further than to suspend performance of the stipulations during the existence of the war. On the contrary, all contracts entered into in French territory by any person with subjects of the German Empire or with persons residing therein *after* August 4, 1914, or with the subjects of Austria-Hungary or persons residing therein, after August 13, were declared to be null and void *ab initio* as being contrary to public policy.<sup>2</sup> It will be noted that the entering into such contracts was forbidden, and the sanction of nullity and not merely suspension of execution was pronounced. But contracts for the delivery of goods or the payment of money, where the execution had already commenced on the date of the decree, might be executed.

The application of the provisions of the decree relative to the status of contracts raised numerous questions for decision by the French courts, a few of which are here examined. In the case of *Gaertner*<sup>3</sup> the tribunal of Bordeaux held that the outbreak of war did not *ipso facto* operate to discharge a debtor

<sup>1</sup> Cf. the decision of the tribunal of commerce of Marseilles, 43 Clunet, 1114 (1915). In this case the execution of the contract was held to be lawful, because it was to the interest of the French plaintiff that it should be performed. A similar case was that of *Yulcari v. Dreyfus Cie.*, tribunal of commerce of Marseilles, November, 1915 (44 Clunet, p. 1015), and that of *Calas v. Mathon*, civil tribunal of the Seine, April, 1917 (44 Clunet, p. 1391). In these and other cases it was held that the decree of September 27 was aimed only at contracts the execution of which would benefit the enemy and not at those which would inure to the benefit of the French parties. In the last-mentioned case it was also held that the purpose of the decree was not to release Frenchmen from the performance of their contracts when the performance did not involve trading with the enemy or benefiting him. Cf. also the case of *Boyer v. Schrimmel et Cie.*, 45 Clunet, 643 (tribunal of commerce of Marseilles).

<sup>2</sup> By a decree of November 7, 1915, the nullity thus pronounced was extended to contracts entered into with subjects of Bulgaria or other persons residing therein. In the case of *Assal* the correctional tribunal of the Seine (44 Clunet, 593) held that an agreement between a neutral resident of Paris with a German firm on January 14, 1915, by which the former was to receive as its agent one-half the salary he had received before the war, was in violation of article 4 of the French law of April 4, 1915, prohibiting commercial intercourse with the enemy. There was no evidence that there had been any intercourse with the enemy after April 4, 1915; but the defendant had apparently paid himself out of his principal's resources in France.

<sup>3</sup> 43 Clunet, pp. 1592 ff.

from his obligations, nor did it in itself interdict trade with the enemy. It put no obstacle in the way of the execution by enemy subjects of their obligations toward Frenchmen. Gaertner was a German subject who had purchased a quantity of resinous products from a Frenchman prior to the outbreak of the war, a portion of which had been delivered. Upon the outbreak of war he fled to a foreign country, and his property was put under sequestration. Not having performed the stipulations of his contract, the French creditor brought an action for recovery of damages against the sequestrator. The tribunal held that the decree of September 27 did not operate to discharge enemy subjects from the performance of their obligations toward Frenchmen; consequently, a judgment for damages and for the sum due was rendered in favor of the plaintiff. In the case of *Anker v. Société Coloniale* the status of a contract between a German engineer and a French company entered into before the war, by which the former engaged to construct certain works at Marseilles, was involved. Under the terms of the contract the work was not to begin later than the end of September, 1914, and upon the conclusion of the contract the company advanced the sum of 500,000 francs to the German engineer as the first payment in execution of the contract. After the outbreak of the war the company brought suit for the recovery of the sum advanced. The court of appeal held that the contract was terminated by reason of circumstances of *force majeure* arising from the outbreak of war which rendered its execution unlawful and materially impossible, this notwithstanding a clause in the contract which excluded the existence of war from the causes of nullity specified.<sup>1</sup>

But the tribunal of commerce of Havre held that the execution of a contract between a French house in Paris and a German firm at Havre, when the latter had been put under sequestration, was not forbidden by the decree of September 27. The contract was one of sale by the German house to the Paris house, and only a portion of the goods had been delivered at the outbreak of the war. The sequestrator brought suit for the enforcement of the unperformed stipulations of the agreement. The tribunal in its decision laid down the general rule that the decree did not apply to contracts between French and enemy houses in French

<sup>1</sup> 43 Clunet, p. 579.

territory when the latter were under sequestration, but that such contracts could not be executed unless the enemy house were under sequestration. There was no danger to the national defence in permitting the execution of contracts after the enemy house had been under sequestration, because payments of money or delivery of goods in such cases would be made to the sequestrator and not to the enemy.<sup>1</sup> Regarding partnership contracts between French and enemy subjects the French courts held that such agreements were merely suspended for the period of the war and not abrogated if the house was situated in France and the partnership was organized in pursuance of French law. Enemy partners did not cease to be partners, although they were incapacitated under the decree of September 27 from exercising their rights. Consequently the act of a *syndicat professionnel*, which had struck from the lists of its membership a German member and had forbidden him the *entrée* to its meetings, was a lawful act.<sup>2</sup> With regard to insurance contracts between Frenchmen and enemy aliens the French courts held that those entered into subsequent to the outbreak of the war were null and void *ab initio*. Policies, however, taken out before the war, but which were not in process of execution at the beginning of the war, were annulable by the courts. All others remained in effect, but their execution for the benefit of an enemy subject, unless he was under sequestration, was suspended until the conclusion of the war.<sup>3</sup> In the case of policies expiring during the war the insured or his beneficiaries, if enemies, could not collect until the end of the war. While they could not pay premiums to the French companies without violating their duties toward their own governments, the companies could collect by suit overdue premiums from the property of the insured, and it was the duty of sequestrators to pay such sums out of the property held by them.<sup>4</sup>

The question was early raised as to whether it was lawful for a Frenchman to remain in a company in which there were enemy

<sup>1</sup> *Mets et Cie v. Derode Frères*, 43 Clunet, pp. 1126 ff. Cf. also the case of *Dieckman et Cie.*, *ibid.*, pp. 1135 ff.

<sup>2</sup> Tribunal of the Seine (1915), *Ericksen Roth and Sutro*, 43 Clunet, pp. 616 ff.

<sup>3</sup> *Cie. La Munich, Séquestre Marty v. Société des Ateliers et Chantiers de la Bretagne* (1915), tribunal of commerce of Nantes, 43 Clunet, pp. 969 ff.

<sup>4</sup> For a discussion of the subject cf. an article entitled *Les Sujets Ennemis Assurés à des Compagnies Françaises*, in 42 Clunet, pp. 150-157.

shareholders. Would a continuation of such relations be "holding intercourse with the enemy"? The law on this point was not clear, but it was felt that such association was contrary to the spirit of the law and of public policy. At the outset French partners of such companies applied to the tribunals of commerce for decrees of dissolution, but the latter took the view that they had no jurisdiction to issue such orders, since it was a question of public policy over which only the common law judges had authority.<sup>1</sup>

As to whether the act of a French *avocat* in taking the case of an enemy subject and defending him in court was a contract forbidden by the decree of September 27 there was a difference of opinion among the courts, and conflicting decisions were rendered. The tribunal of commerce of the Seine and the civil tribunals of Besançon and Marseilles held that such employment was in effect a commercial contract and therefore unlawful; but this view was criticised as being contrary to the spirit of the decree, which, it was argued, was directed against commercial transactions only and not against civil relations or professional services.<sup>2</sup> The court of Paris by a decision of April 20, 1916, however, ruled that French *avocats* might lawfully defend enemy subjects, since such service did not involve commercial relations.

By a law passed on January 21, 1918, contracts and agreements of a commercial character, entered into prior to August 1, 1914, between Frenchmen and enemy subjects and stipulating for the delivery of merchandise or commodities, might be annulled upon the petition of one of the parties to the contract whenever it was established that by reason of the state of war the performance of the stipulations by one of the parties would entail obligations which would work prejudice to him greatly beyond what could have been reasonably expected at the time the contract was made.<sup>3</sup> The purpose of the law was to enable Frenchmen whose credit was affected by such contracts to free themselves from the obligations thereof. Notwithstanding the fact that the terms of the law were limited to contracts of a commercial character, the French courts held that it applied

<sup>1</sup> Tribunal of commerce of the Seine, 43 *Clunet*, p. 1300.

<sup>2</sup> Cf. *Clunet's* criticism, 43 *ibid.*, p. 797, and 44, p. 240.

<sup>3</sup> Text in 45 *Clunet*, p. 819.

to all contracts concluded before August 1, 1914, and to *sociétés* composed of French and enemy subjects.<sup>1</sup>

§ 174. **German Theory and Practice.** There was nothing in the law of the German Empire when the war broke out prohibiting the making or performance of contracts between German subjects or other residents of the Empire and subjects of countries at war with Germany. The English common law rule regarding the effect of war on contracts and the interpretation placed on section 23 (*h*) of the Hague convention of 1907 concerning the laws and customs of war on land, which declares that it is forbidden "to declare abolished, suspended or inadmissible the right of the subjects of the hostile party to institute legal proceedings," were the objects of violent attack by the German jurists and text writers. The views of Dr. Sieveking of Hamburg at the Madrid Conference of the International Law Association have already been set forth in the early part of this chapter. In general, the German contention was that the purpose and effect of the Hague provision was to prohibit any legislative measures which would prevent an enemy subject from enforcing the execution of a contract by recourse to the courts of the State in which he was an enemy alien. The English view, on the other hand, was that the provision was merely a prohibition on the powers of the military authorities in occupied territory. At the meeting of the German branch of the association at Berlin on November 29, 1913, the question of the effect of war on contracts was one of the topics of special discussion. Adverting to the interpretation placed by the British foreign office in a letter to Professor Oppenheim on the meaning of section 23 (*h*), Professor Joseph Kohler asserted that the plain meaning of the section was to prohibit belligerent States from extinguishing contracts between their nationals and those of their adversaries or from preventing the enforcement of them by denial of a *persona standi judicio*.

"It has been said," observed Professor Kohler, "that it would certainly not be against good faith if an English insurance company should say, 'I will not pay, because my country, my government, permits me to refuse.' That would be against good faith. There are principles that are even

<sup>1</sup> Cases of *Delpuech v. Arndt et Moraël*, 45 Clunet, p. 648 (civil tribunal of the Seine), and *Mathon, Leduc, Heiset Cie. v. Austerwiël et Calas*, 45 Clunet 65 (civil tribunal of Versailles), and 45 Clunet, p. 1062.

superior to legislation. There are principles that are axiomatic in our modern law. If a State should permit the robbing of prisoners of war or their enslavement, even though the State should sanction it a hundred times, we would still say that a person committing the act is a barbarian. I must, therefore, declare that such action, in spite of what the English government may say, is against good faith; what one has promised, he must fulfil."

He then pointed out the necessity of informing the German commercial world of the danger of dealing with England while the provisions of the English law in this regard remained in their present condition, a condition that could only be designated as one of "barbarism and lack of civilization" (*Barbarei und Unkultur*). At the same meeting a resolution was unanimously adopted that "the security of private obligations against the effect of war by means of international treaties is an urgent necessity" and that the association should exercise its influence to the attainment of that end.

None of the early German ordinances relating to trade with the enemy, the right of access of enemy aliens to the courts, or the sequestration of enemy property contained any prohibitions in respect to the making or performance of contracts. The first and only legislation dealing with the matter was the ordinance of December 16, 1916, which empowered the Chancellor by way of reprisal to declare upon petition of a German party the annulment in whole or in part of any contract of sale or delivery made between a German subject, firm, or corporation and a subject of Great Britain, France, or Italy, or any contract of hire, charter, party, or affreightment relating to carriage of goods by sea. Stock-exchange transactions were expressly excluded and of course all other contracts than those mentioned. Consequently contracts of lease, rent, and the like were not affected. Both natural and juristic persons having their domicile or principal commercial establishment in enemy territory, and other commercial associations having their principal office in other foreign countries, if enemy subjects preponderated in the membership, were to be deemed for the purpose of the ordinance as enemy subjects. The courts were to have jurisdiction to decide controversies in respect to the effect of war on rights and duties arising under contracts. It will be noted that the ordinance made no distinction between contracts entered into *before* the

war and those entered into *after* the outbreak of war. Nor did it make any distinction between those whose performance would inure to the benefit of the enemy and those which did not. No power was conferred upon the Chancellor to suspend merely the latter class of contracts, as was provided for in France; his only power was to dissolve, and this power applied to all alike. It will be noted also that the power to dissolve applied only to contracts between German subjects and enemy subjects; contracts in which persons of non-German nationality residing in the Empire, including even those to which subjects of enemy powers were parties, were not to be interfered with. Nationality and not domicile, therefore, was the principle on which this portion of the ordinance was based. But contracts between German subjects domiciled outside the Empire and enemy subjects were undoubtedly subject to the terms of the ordinance. Thus a contract between a German subject in New York and a British subject in Mexico could be dissolved. The application of the ordinance to contracts with commercial partnerships composed partly of enemy and partly of neutral members, doing business in neutral countries, was calculated to provoke protests by neutral governments in behalf of their nationals affected thereby.<sup>1</sup>

<sup>1</sup> Cf. an article entitled "The German Enemy Contracts Annulment Ordinance" of December 16, 1916, *International Law Notes*, January, 1917, pp. 5-7. Also Huberich, *Solicitors' Journal and Weekly Reporter*, Vol. 61, p. 155. The former article contains an English translation of the text of the decree. Cf. also Soergel, *Kriegsrechtssprechung und Kriegsrechtslehre*, 1916. At the beginning of the war, says Huberich (*Solicitors' Journal*, October 31, 1914, p. 22), a number of German employers discharged their British employes without observing the terms of the contract of employment relating to notice. The commercial courts, before whom these cases were heard, decided that neither the existence of a state of war, nor the fact that the employé was the subject of an enemy State justified a dismissal not in conformity with the contract of service.



## CHAPTER X

### *FORBIDDEN WEAPONS AND INSTRUMENTALITIES*

§ 175. New Instruments and Methods Employed in the Recent War; § 176. Forbidden Bullets; § 177. Charges and Counter-charges during the Late War; § 178. The Law and Evidence Reviewed; § 179. German Protest against the Use of Shot Guns; § 180. Use of Asphyxiating and Poisonous Gases; § 181. Lawfulness of this Mode of Warfare; § 182. The German Defence; § 183. Provisions of the Hague Convention; § 184. German Theory in Respect to Instrumentalities and Means; Views of von Clausewitz, von Hartmann, and von Moltke; § 185. Views of the *Kriegsbrauch im Landkriege*; § 186. Views of Contemporary German Militarists and Publicists; § 187. The More Enlightened View.

§ 175. **New Instruments and Methods Employed in the Recent War.** A fact which differentiated the late war from all others of the past was the variety of new and ingenious instruments of destruction employed by the contending belligerents. Among such agencies of destruction which were used or alleged to have been employed were dum-dum bullets, explosive projectiles and bombs, asphyxiating and poisonous gases, liquid fire, charged electric wires, submarine mines, and submarine torpedo boats. The progress of invention in modern times has produced one diabolical instrument after another for destroying men and inflicting agonizing and incurable wounds, until the collection of such agencies has come to include not only those mentioned above, but many others.

§ 176. **Forbidden Bullets.** During the recent war the first instrument the alleged use of which evoked protest was the so-called dum-dum bullet. As is well known, this bullet was an English invention and appears to have been first used by the British in their campaigns against the religious fanatics of India and Africa, whose charges ordinary bullets were insufficient to repel.<sup>1</sup> The British forces were charged by the Boers with employing this bullet during the South African war, and counter-charges of a similar character were made by the British against

<sup>1</sup> Spaight, p. 79; Bordwell, p. 138

the Boers. Each belligerent denied the charges of the other, but the evidence would seem to indicate that both in fact made use of it, although only in exceptional cases.<sup>1</sup> It should be remarked, however, that neither belligerent was a party to the Hague declaration of 1899, which forbade the employment of expanding bullets.

Charges were also made that bullets of this character were used by the American troops in the Philippines in 1898-1899, but the charges were denied. Similar charges were made against the Russians during the Russo-Japanese war, and the Russians replied with a counter-charge against the Japanese for using shells charged with lyddite during the bombardment of Vladivostok.<sup>2</sup> During the Turco-Italian war of 1911-1912 each belligerent likewise accused the other of employing expanding bullets.<sup>3</sup>

§ 177. Charges and Counter-charges during the Late War. During the first month of the recent war both expanding and explosive bullets are alleged to have been used by the Germans in the battles of Werchter, Lubbeck, Chapelle-au-Bois, and Alost.<sup>4</sup> Among the spoils of war found by the French and

<sup>1</sup> Cf. Spaight, p. 80; Bordwell, p. 140; Baty, *International Law in South Africa*, p. 78.

<sup>2</sup> Hershey, *International Law and Diplomacy of the Russo-Japanese War*, p. 317, and Takahashi, *International Law as Applied in the Russo-Japanese War*, pp. 173 ff.

<sup>3</sup> Coquet, *La Guerre Italo-Turque*, *Rev. Gén. de Droit Int. Pub.*, 1913, pp. 532-533. George F. Abbot in his book entitled *The Holy War in Tripoli* (pp. 289-290) says he saw bullets of this kind which were used by the Italians. Likewise the massive Snyder bullet as used by the Turks and Arabs was very cruel in effect, although it was not explosive and therefore probably not forbidden by the laws of war.

<sup>4</sup> Cf. the affidavits of certain physicians in the Belgian and French service and other evidence in the second and seventh reports of the Belgian commission of inquiry on *Violations of the Rights of Nations and of the Laws and Customs of War*, p. 44; also *The Case of Belgium*, p. 27; Davignon, *Belgium and Germany*, p. 39; Bland, *Germany's Violation of the Laws of War*, Documents, pp. 91-97 and 254 ff.; Saint Yves, *Les Responsabilités de l'Allemagne dans la Guerre de 1914*, p. 419. The charges against the Germans with the accompanying evidence are detailed in a French official report entitled *Rapports et Procès-Verbaux d'Enquête de la Commission Instituée en Vue de Constater les Actes Commis par l'Ennemi en Violation du Droit des Gens*, Vols. III-IV, p. 10. Dum-dum and other forbidden projectiles, the report charges, were found in large numbers in German *cartouches*, which fell into the hands of the French. Cf. also a large amount of documentary evidence in a French official publication entitled *Les Violations des Lois de la Guerre par l'Allemagne: publication fait par les soins du Ministère des Affaires Étrangères*, Paris, 1915 (especially chapter VI). Among the documents printed

Belgians on various battle fields of Belgium and France is said to have been a large amount of dum-dum ammunition and many cartridges in which the bullets had been reversed, with their bases outward.<sup>1</sup> The Germans were also charged with having used similar bullets in Africa, especially in the Cameroons and Togoland.<sup>2</sup> Against this alleged use of bullets forbidden by the Hague convention both the British and French governments protested to the signatory powers.<sup>3</sup> In April, 1917, the Germans on their part charged that British and French troops were guilty of having used forbidden bullets,<sup>4</sup> and many affidavits and other documentary evidence were published in support of the charges. Dum-dum bullets, it was asserted, were issued to British soldiers before the battle of Mons in August, 1914, and a large quantity of French dum-dums is alleged to have been found at Longwy, Montmédy, and Schirmeck when those towns were occupied by the German forces.<sup>5</sup> After these dis-

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in Bland's collection (p. 278) is an order of the day issued by General von Lüttwitz referring to the fact that explosive bullets having been issued to the German troops by oversight, he considered it necessary in order to avoid French criticism to issue orders to all German ammunition depots that no such bullets be furnished the troops *in the future*.

<sup>1</sup> Cf. *An Eye Witness's Narrative of the War*, p. 241.

<sup>2</sup> Cf. the British Parl. paper entitled *German Atrocities and Breaches of the Rules of War in Africa* (1916), Cd. 8306, p. 5; also a memorandum of the British war office of October 17, 1914.

<sup>3</sup> *London Times*, August 23, 1914.

<sup>4</sup> The Bulgarian government is also reported to have protested three times in succession against the alleged use by the British and French troops of "dum-dum and other kinds of bullets with double covers which explode when they strike and which produce terrible wounds." In the third protest the Bulgarian government declared that in the future it would be compelled to resort to the severest reprisals against British and French prisoners in order to compel respect for the rules of international law. Charges were also made by the Germans against certain British aviators for having made use of "tracer bullets," and in October, 1917, two captured aviators were court-martialed for having such bullets in their possession. The British government explained that such bullets were used by all the belligerents for the purpose of correcting the aim of the gunners and pointed out that they were not forbidden by the Hague convention. The British authorities claim to have found similar bullets in the possession of captured German aviators. *N. Y. Times*, October 8, 1917.

<sup>5</sup> Cf. von Mach, *Germany's Point of View*, pp. 52 ff. In a public statement issued by Count Bernstorff at Washington on October 14, 1914, he described the bullets found at the above-mentioned places as bullets "the softer lead nucleus of which will upon impact emerge from the steel mantle and flatten out, thus causing peculiarly cruel wounds and needless suffering."

James O'Donnell Bennett, a newspaper correspondent, claims to have seen

coveries the German Emperor addressed the following protest to the President of the United States:

"I consider it my duty to inform you, as the most distinguished representative of humanitarian principles, of the fact that my troops found, after the taking of the French fortress of Longwy, in that place, thousands of dum-dum bullets made by the special factories of the government. Bullets of the same kind have been found on dead English soldiers; also on the wounded and prisoners. You are aware of the terrible wounds and suffering caused by these bullets, and that their use is forbidden by the recognized principles of international law. I, therefore, make solemn protest against this method of making war, which has become, thanks to the methods of our enemies, one of the most barbarous in history."<sup>1</sup>

§ On learning of the Emperor's telegram, the President of the French Republic addressed a telegram to President Wilson denouncing the German accusation as false and charging that the Emperor's protest was an "audacious attempt" to deceive the people of the United States.<sup>2</sup> The French government admitted that such bullets may have been found by the Germans in the ammunition depots at Longwy and Montmédy, but it asserted that they had been made solely for the practice of rifle clubs and had never been issued to the troops.<sup>3</sup> Moreover, it was added, "as a result of the hollowing out of the bullet the cartridges had lost all their ballistic qualities and were therefore absolutely unfit for military purposes." In a further statement issued on September 12 the French government stigmatized as the "grossest forgeries" what purported to be fac-similes of labels found by the Germans on French ammunition boxes and reproduced in the German newspapers showing the presence of dum-dum bullets. The field-service regulations of December 2,

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over 60,000 dum-dum bullets packed in 32 boxes which the Germans had captured in the Maubeuge forts in October, 1914. *Chicago Tribune*, November 12, 1914. Correspondents of foreign newspapers were invited to attend at the German foreign office on September 8 and to see an exhibition of the bullets.

The German charges against the British, French, Russians, and Servians for using dum-dum bullets are detailed in Müller, *Der Weltkrieg, 1914-1915 und der Zusammenbruch des Völkerrechts* (Berlin, 1915), pp. 104 ff. The Austrian government charged the Russians with using such bullets at the battle of Trasnik and the matter was brought to the attention of the powers signatory to the Hague convention.

<sup>1</sup> Text in Cook, *Kaiser, Krupp and Kultur*, p. 152, and Munroe (editor), *German War Practices*, p. 16 (publication of the U. S. Committee on Public Information).

<sup>2</sup> Text in 22 *Rev. Gén. de Droit Int. Pub.* (1915), Docs., p. 80.

<sup>3</sup> Text in Bland, p. 260, and in *Rev. Gén.*, *ibid.*, p. 81.

1913, it was said, contained an express provision prohibiting the use of such bullets,<sup>1</sup> and these regulations had been strictly adhered to.<sup>2</sup>

The British government likewise denied the German accusation. Neither the British nor the French army, it said, had in its possession or had issued any but the approved patterns of rifle and revolver ammunition. In a memorandum of November 17, 1914, the war office quoted the opinion of Sir Victor Horsley that the type of bullet used by the British forces was "probably the most humane projectile yet devised, for the long solid point, with the core completely covered, prevents it from breaking up into fragments and thus makes a clean incisive wound."<sup>3</sup> The British government on its part charged the Germans not only with using dum-dums but a bullet which was even more objectionable, although not expressly forbidden by the Hague convention. This bullet was described as one which turns completely over when it strikes the body and goes through end reversed. The base, having no cover, spreads upon contact in a manner similar to the dum-dum and with equally deadly results.<sup>4</sup>

In December, 1914, Count Bernstorff laid before the American department of state further evidence consisting of photographs and specimen cartridges in support of the charge that bullets forbidden by the Hague convention were being used by the

<sup>1</sup> The provision referred to is identical with that of the Hague convention. See the French manual, *Les Lois de la Guerre Continentale*, prepared by the general staff, ch. II, art. 57, § 3, p. 57.

<sup>2</sup> The French minister of war in a communication of September 20 to the minister of foreign affairs denounced the German charges as unsupported by any sort of proof and reiterated the charges against Germany with specifications and details to show that from the very beginning of the war the Germans had made use of bullets forbidden by the Hague convention. If, he concluded, dum-dums were found at Longwy, they were there by mistake and had never been issued to the troops. Text in Bland, pp. 254-261.

<sup>3</sup> Baty and Morgan, *War, Its Conduct and Legal Results*, p. 192. Cf. also an article entitled, "The Gentlest Bullet," in the *Scientific American*, Supplement, Vol. 79, p. 304.

<sup>4</sup> This type of bullet was used by Colonel Roosevelt for hunting big game in Africa in 1909 and by Stuart Edward White during his hunting trip through East Africa in 1910. *Scientific American*, Supp., Vol. 79, p. 304. "There could be no greater contrast," says an English surgeon (Soutar, *A Surgeon in Belgium*, p. 26), "between the wounds with which we had to deal in South Africa produced by ordinary bullets and those which our soldiers are now receiving from German rifles. The former were often so light that it was quite a common occurrence for a soldier to discover accidentally that he had been wounded sometime previously. In the present war rifle wounds have been among the most deadly with which we have had to deal."

British and French troops. "Soft nosed and other dum-dum bullets," he said, "had lately been found which were made by the firm of Ely brothers of London." Furthermore, he charged the British government with having lately placed with the Winchester repeating arms company of the United States an order for 50,000,000 "buck shot cartridges" (each containing nine bullets), the use of which had "hitherto been unknown in civilized warfare." Finally, he charged that the Union metallic cartridge company of Bridgeport, Connecticut, had secured a patent for a "mushroom bullet" and that during the past two or three months 8,000,000 such bullets had been sent by the firm to Canada for use in the British army. No outside sign, he said, distinguished them from ordinary bullets, so that the soldier who used them could not be aware of their character. The Winchester company promptly characterized the charge against it as "absolutely without foundation." The department of state made an investigation of the charges against the Union metallic cartridge company and informed Count Bernstorff that

"Investigation discloses that the company had sold 100,000 soft-nosed bullets for the use of sportsmen and that the cartridges will not fit the rifles of any belligerent. The department is in receipt from the company of a complete detailed list of the persons to whom these cartridges were sold to firms in lots of twenty to 2,000 and one lot each of 3,000, 4,000, and, 5,000. Of these only 960 cartridges went to British North America and 100 to British East Africa. If, however, you can furnish the department with evidence that this or any other company is manufacturing and selling for the use of the contending armies in Europe cartridges whose use would contravene the Hague convention, the government would be glad to be furnished with the evidence."<sup>1</sup>

The Austro-Hungarian government also charged that the troops of Servia made use of "soft nosed" and even of explosive bullets during the first months of the war. Many depositions of Austro-Hungarian soldiers and officers and numerous photographs of cartridges and of the wounds alleged to have been made by such bullets were collected and published by the Austro-Hungarian government in an official red book.<sup>2</sup>

<sup>1</sup> The secretary of state also added: "The President directs me to inform you that in case any American company is shown to be engaged in this traffic he will use his influence to prevent, so far as possible, sales of such ammunition to the powers engaged in the European war, without regard to whether it is the duty of this government upon legal or conventional grounds to take such action."

<sup>2</sup> *Collection of Evidence concerning Violations of International Law by the Countries at War with Austria-Hungary*, published by the ministry of foreign affairs.



The Austro-Hungarian troops were in turn accused of using similar bullets against the troops of Servia. M. Reiss, a professor in the University of Lausanne, made an investigation of the charges and published an array of evidence, consisting in large part of depositions and photographs, to show that the Austro-Hungarian troops not only used expanding but also explosive bullets on a large scale. Cartridges, he asserts, were found in the possession of Austrian prisoners of war which were outwardly exactly like ordinary cartridges, except that they had a black or red ring around the case near the shoulder. Later, whole boxes of such ammunition were alleged to have been found on the battle fields.<sup>1</sup>

The Austro-Hungarian government appears to have at first denied the charge, but later admitted that such bullets had been employed for the purpose of range finding.

The Russian government made similar charges against the Austro-Hungarian troops and is reported to have threatened to shoot every Austro-Hungarian captive found with such bullets in his possession. In consequence of this threat the Austro-Hungarian authorities are alleged to have instructed the ammunition depots at Przemyśl not to issue in the future such cartridges except upon an order of the general staff.<sup>2</sup>

§ 178. **The Law and the Evidence Reviewed.** It will be seen from this review that practically all of the belligerents on each side accused those on the other side of using bullets forbidden either by the Hague convention or the usages of civilized warfare and that each emphatically denounced the charges as false. The evidence at hand, however, does not indicate that any general use of the type of bullet forbidden by the Hague con-

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Cf. especially pp. 63-78. In a subsequent statement issued by the Austrian government the allied troops in Servia and Montenegro were charged with having used cartridges filled with wire nails and pieces of copper, with having poisoned wells, with making improper use of the white flag, etc. The Russians were also accused of having used dum-dum bullets, with firing on ambulances, etc.

<sup>1</sup> See his brochure, *How Austria-Hungary Waged War in Servia*, pp. 4-10.

<sup>2</sup> Press despatches of April 21, 1915. In March, 1917, the Russian government transmitted to the governments of Germany, Austria, Bulgaria, and Turkey a lengthy protest against alleged violations of the usages of warfare, and threatened to retaliate in kind. The abuses charged included the use of explosive bullets, gas, burning liquid, and poisoned missiles, the poisoning of wells, misuse of flags of truce and Red Cross flags, killing of wounded, throwing of bombs upon sanitary trains, and the sinking of the hospital ship *Portugal*.



vention was authorized by any belligerent, or that it was in fact used except perhaps in occasional instances. Ordinance experts point out that any soldier can easily "dum-dum" an ordinary bullet without the knowledge of his superiors and thus convert it into a forbidden instrument.<sup>1</sup> One explanation is that the wounds diagnosed as having been caused by dum-dums were made by a substitute for the dum-dum, the so-called Spitz or Spitzer bullet, which though not expressly forbidden by the Hague convention, is equally as objectionable as the one condemned.<sup>2</sup> The reason advanced by the French government in explanation of the presence of dum-dum ammunition at Longwy, later captured by the Germans, seems plausible, and in the absence of more conclusive evidence than the German government has yet made public, we should hardly be justified in imputing bad faith to the French government, which denied emphatically and repeatedly the German charges.

The use of the so-called dum-dum bullets, i.e., those which "expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions," was forbidden by Declaration III of the First Hague Conference. The United States, Great Britain, and Portugal declined to give their adhesion to the declaration, but the two latter powers became parties in 1907, leaving the United States as the only power represented at the Conference of 1899 which has not accepted it. At the time the acts complained of were alleged to have been committed, all the belligerents were parties to the Declaration of 1899, and it was therefore binding upon all of them. The use of explosive projectiles weighing less than fourteen ounces was prohibited by the Declaration of St. Petersburg of 1868, a prohibition which was incorporated by reference in article 23 of the Hague conventions of 1899 and 1907 respecting the laws and customs of war on land, which adds to the "prohibitions provided for by special conventions" various others, among them the employment of "arms, projectiles or material of a nature to cause superfluous injury." This latter convention would seem to prohibit the use of explosive bullets, with which several belligerents were

<sup>1</sup> Cf. the *Scientific American* of October 3, 1914. But of course an ordinary bullet could not by this means be converted into an explosive one.

<sup>2</sup> Cf. E. C. Crossman in the *Scientific American*, April 17, 1915, p. 358.

charged. Nevertheless, since the convention was not ratified by all the belligerents in the recent war in accordance with the general participation clause, it was not technically binding on any of them. Since article 23 prohibits the use of all weapons which cause superfluous injury, the prohibition would probably include the Spitzer and other bullets not belonging to the dum-dum type, against the alleged use of which various protests were made.

§ 179. **German Protest against the Use of Shot Guns.** In September, 1918, the German government through the Swiss legation at Washington addressed a protest to the American government against the use of shot guns by the American army and called its attention to the fact that "according to the law of war (*Kriegsrecht*) every prisoner found to have in his possession such guns or ammunition belonging thereto forfeits his life." The protest was based on article 23 (e) of the Hague convention respecting the laws and customs of war on land, which forbids the employment of "arms, projectiles or materials calculated to cause unnecessary suffering." To this communication the secretary of state replied in a note of September 28, in which he stated that in the opinion of the government of the United States the provision of the Hague convention referred to did not forbid the employment of the shot gun; that by reason of the effects of its present use and in the light of a comparison of it with other approved weapons its use could not be made the subject of legitimate or reasonable protest; that the United States would not abandon its use, and that in case the German government should carry out in a single instance its threat to execute American prisoners found to have such a weapon in their possession, it would be "the right and duty of the government of the United States to make such reprisals as will best protect the American forces, and notice is hereby given of the intention of the government of the United States to make such reprisals."<sup>1</sup> The threat of the German government does not appear to have been carried out in any case. In view of the character of certain other weapons, the use of which in warfare is universally approved, the German protest was clearly not well founded, and in view of Germany's use of far more

<sup>1</sup> Text of the German communication and the reply of the secretary of state in the *Official Bulletin* for October 1, 1918, p. 1.

objectionable weapons and instruments, such as explosive bullets, liquid fire, and poisonous gases, she was hardly in a position to protest against the use of shot guns. The above-mentioned prohibition of the Hague convention is not directed against any particular kind of weapon, but against the infliction of useless suffering, that is, suffering that bears no reasonable relation to killing or the rendering of the victim *hors de combat*. The use of a shot gun is analagous to the employment of shrapnel shell or a machine gun and is certainly less condemnable than the flame-thrower or the poisoned gas shell.<sup>1</sup>

§ 180. **Use of Asphyxiating and Poisonous Gases.** A method employed for the first time during the recent war and the lawfulness of which was questioned in many quarters was the use of gases which were asphyxiating if not poisonous in character. This new instrumentality appears to have been first employed by the Germans on April 22, 1915, during the second battle of Ypres.<sup>2</sup> On April 24 a second "gas attack" was made by the Germans at the same place, and this was followed by a third attack on May 1 and May 2, and a fourth on May 5. Other gas attacks by the Germans were made from time to time throughout the remaining years of the war, though with less success, for the enemy soon discovered means of protecting himself against the effect of the fumes.

Sir John French, in his report on the second battle of Ypres, thus describes the use and effect of this method of attack by the Germans:

"Following a heavy bombardment the enemy attacked the French division at about 5 P.M. (April 22) using asphyxiating gases for the first

<sup>1</sup> It does not appear whether shot guns were used by the American forces in actual fighting, though they are said to have been used by the marines in Belleau Wood. American officials admitted that they were used by the troops for general police work and for the guarding of prisoners, because the results were less fatal than those of high-powered rifles.

<sup>2</sup> Cf. the report of Sir John French on the second battle of Ypres, London weekly *Times* of July 16, 1915; also the London *Times History of the War*, Vol. V, p. 53; Valentine Williams, correspondent of the London *Daily Mail*, in his book, *With Our Army in Flanders*, pp. 49 ff. and 59 ff.; Stanley Washburn, correspondent of the London *Times*, in his book, *The Russian Campaign*, pp. 158 ff. and 169 ff.; Bland, *Germany's Violations*, p. 291, and Clunet's brochure, *La Guerre Allemande par l'Asphyxie, l'Empoisonnement et la Combustion de l'Adversaire*, Paris, 1915.

time. Air craft reported that at about 5 P.M. thick yellow smoke had been seen issuing from the German trenches between Langemarck and Bixchoote. The French reported that two simultaneous attacks had been made east of the Ypres-Staden railway in which these asphyxiating gases had been employed. What follows almost defies description. The effect of these poisonous gases was so virulent as to render the whole of the line held by the French division mentioned above practically incapable of any action at all. It was at first impossible for any one to realize what had actually happened. The smoke and fumes hid everything from sight and hundreds of men were thrown into a comatose or dying condition and within an hour the whole position had to be abandoned together with about 50 guns."

The Belgian commission of inquiry investigated the use of asphyxiating gases at Ypres and reported to the minister of justice, M. de Wiart, that four methods were employed in generating them. The first was to light fires in the first line of trenches and permit the wind to blow the gas fumes thus formed towards the lines of the enemy. The three other methods involved enclosing the gas in some kind of missile. These included cans thrown either by hand or mine howitzers, cylinders of compressed gas or shells containing compounds which were transformed into gas when they exploded. The effects of the fumes were felt a distance of half a mile and produced a kind of stupor which lasted for three or four hours.<sup>1</sup>

During the same month the Germans made use of "poisonous" gases in the course of their attacks upon the Russians on the Eastern front, the first instance reported being on May 30, 1915. According to Stanley Washburn, an English newspaper correspondent, the gases were generated as on the Western front, by means of steel cylinders placed in the trenches. At the head of the cylinder was a valve from which ran a leaden pipe over the top of the parapet and then bent down with the opening pointed toward the ground. These tanks were arranged in groups of batteries from ten to twelve feet apart. When the valves were opened, they emitted clouds of thick greenish-yellow fumes of chloral gas which spread like a mist upon the face of the ground and which were wafted by the breeze in the direction of the enemy who were hidden by a wall of smoke and gas.<sup>2</sup>

<sup>1</sup> Cf. also the London weekly *Times* of May 7, 1915, and the *Times History of the War*, Vol. V, p. 70.

<sup>2</sup> See his book, *The Russian Campaign*, pp. 159-164, and also his letter in the London weekly *Times* of June 18, 1915.

The British and French troops naturally considered that retaliation in kind was legitimate,<sup>1</sup> and Sir John French states in one of his reports that a "gas detachment" was organized among the British troops, and it took part with marked success in the operations around Loos in September, 1915. On October 14 another "gas attack" was made by the British on the German trenches between Hulluch and the Hohenzollern redoubt, and thereafter this method of attack was regularly employed by belligerents on both sides.<sup>2</sup>

§ 181. **Lawfulness of this Mode of Warfare.** Whether the employment of gas in this manner was a violation of the Hague convention or the customs of civilized warfare would seem to depend mainly on the character of the gas used and the effect which it produced on the men against whom it was directed. According to the reports of British and French military commanders, medical experts, and newspaper correspondents who saw the victims, the effect was to inflict prolonged and agonizing suffering. Sir John French in his report on the battle of Ypres said:

"The effect of this poison is not merely disabling or painlessly fatal, as has been suggested in the German press. Those victims who do not succumb on the field and who can be brought into hospital suffer acutely and a large proportion of them die a painful and lingering death. Those who survive are in little better shape, as the injury to their lungs appears to be of a permanent character and reduces them to a condition which points to their being invalids for life. These effects must have been well known to the German scientists who devised this new weapon, and to the military authorities who . . . sanctioned its use."

<sup>1</sup> Earl Kitchener stated in the House of Lords on May 18, 1915, that the British and French troops must be adequately protected against poisonous gases by the employment of similar methods by themselves. Lord Armstrong, who had visited France and made inquiries concerning the effect of the German methods, urged a policy of retaliation. There was, however, some opposition to the policy of reprisal. The Archbishop of Canterbury in a letter to the Prime Minister appealed to the government not to resort to the use of asphyxiating gas against the enemy. "Most earnestly do I trust," he said, "that we shall never anywhere be induced or drawn to take a course which would lower us toward the level of those whom we are attacking." The Bishop of London expressed a similar view in a sermon preached on May 16.

<sup>2</sup> In fact, the Germans charged that the use of gas was first resorted to by the enemy (see the German reply to the Appeal of the International Committee of the Red Cross, text in 46 Clunet, 860). But the charges appear to be based on no evidence. Sir John French in his report on the use of asphyxiating gases denounced the charge as an "astounding falsehood."

Similar testimony was given by medical experts<sup>1</sup> and by the newspaper correspondents.<sup>2</sup>

Stanley Washburn, who spent some time studying the effects of the gases used by the Germans on the Eastern front and who visited the trenches and the hospitals and talked with officers, soldiers, and medical experts, declared that the effects were cruel and inhumane. Describing the victims whom he saw in the hospitals at Warsaw, he said: "The sufferings are indescribable, and though I have heretofore seen much misery in warfare I was never more deeply moved than by the sight of these splendid specimens of young manhood dying slow, torturing deaths as the result of this latest method of German warfare." The gas, he said, caused blood congestion and the formation of clots not only in the lungs but in the blood vessels and arteries, the blood becoming so thick that it was with great difficulty that the heart forced it through the veins.<sup>3</sup>

§ 182. **The German Defence.** The Germans themselves defended the use of asphyxiating gases on various grounds.

<sup>1</sup> Dr. John Haldane, a high authority on the physiology of respiration, who was sent to France to make an investigation of the effect of the gases thus used by the Germans at Ypres, made a report to the war office in which, speaking of the condition of certain Canadian troops whom he had examined, he said: "These men were lying struggling for breath and blue in the face. On examining their blood with a spectroscope and by other means I ascertained that the blueness was not due to the presence of any abnormal pigment. There was nothing to account for the blueness and their struggles for air but one fact, and that was that they were suffering from acute bronchitis, such as is caused by the inhalation of an irritant gas. Their statements were to the effect that when in the trenches they had been overwhelmed by an irritant gas produced in front of the German trenches and carried toward them by a gentle breeze. There was no doubt that the bronchitis and accompanying slow asphyxiation were due to irritant gas." The text of this report is printed in the London weekly *Times* of April 30, 1915. Cf. also certain extracts from a report of H. B. Baker, a chemist (*Current Opinion*, July, 1915, p. 37), who stated that "both chlorine and bromine when present to the extent of 5 per cent in the air rapidly cause death by suffocation by acting on the mucous linings of the nose, throat, and lungs." Cf. also the reports of various French medical experts in Bland, *op. cit.*, pp. 290 ff. These reports are all in agreement that the gas fumes used were poisonous, that they affected seriously the lungs and respiratory organs of the victims, produced pulmonary congestion and the spitting of blood, and caused intense and prolonged suffering to those who inhaled them.

<sup>2</sup> Cf. an article by Alexander Powell, "On the Firing Line," *Scribner's Magazine*, October, 1915, pp. 461-462.

<sup>3</sup> See his despatch in the London weekly *Times* of June 18, 1915; also his *Russian Campaign*, pp. 170-174, and the *London Times History of the War*, Vol. V, p. 65.



In the first place, it was no more inhumane, they argued, than various methods and agencies employed by the enemy, such as the bombardment of trenches<sup>1</sup> and the flooding of the country with water, as was done by the Belgians in the region of Nieuport<sup>2</sup> and by the Germans themselves in the valley of the Oise in the spring of 1917. Furthermore, the Germans maintained that the gas used by them was not of such a character as to inflict permanent injury upon those who inhaled it and that the suffering which it produced was neither cruel nor torturing in character. The testimony, however, of medical experts, hospital attachés, and other persons who saw the victims was so strongly to the contrary that the Germans were driven to rest their defence largely on the ground of reprisal against the enemy for having first resorted to the use of gas. The German charges against the allied troops, however, are of the most general character, and it appears that no specific instance of the employment of gas before the Germans used it at Ypres was ever cited in their allegations. The emphatic denials of the British and French governments, together with the inconclusive character of the German evidence, make it quite certain that the charge was without foundation.<sup>3</sup>

Lord Kitchener, referring in the House of Lords on May 18, 1915, to the German gas attacks at Ypres accused Germany of having "stooped to acts which will surely stain indelibly

<sup>1</sup> Thus the *Frankfurter Zeitung* asked whether there was any difference between the throwing of thousands of grenades into the ranks of the enemy, tearing every living thing to pieces and making the German trenches an inferno, as was done at Neuve Chapelle, and the spreading of noxious gases over a wide battle field without causing the suffering which results from the mangling and mutilation of human bodies.

<sup>2</sup> Semi-official statement issued at Berlin, June 26, 1915. "It is really difficult to see," says this statement, "what fundamental difference there can be between this application in war of the watery element and that of gaseous elements. Anyone who was not indignant or even surprised when our opponents invoked the help of water against us in Flanders will have no reason to be indignant now if we instead of that make the air our ally and use it to waft stupefying gases to our enemies. Anyone who has once seen the living picture of the hell provided by a rain of shells, hand grenades, subterranean mines and aerial bombs upon a bit of trench will certainly not regard slowly approaching clouds of smoke as a more inhumane method of warfare."

<sup>3</sup> General von Stein in 1918 admitted that the Germans were the first to make use of gas as an instrument of attack. "We organized the employment of gas," he said, "and the enemy soon followed." Quoted in the *Boston Transcript* of April 24, 1918.



her military history, and which would vie with the barbarous savagery of the Dervishes of the Sudan.”<sup>1</sup> Lord Armstrong in a letter to the *London Times* described this mode of warfare as “probably the most devilish ever invented by human ingenuity” and one which had converted the English feeling of “good-natured tolerance” toward the Germans into one of “intense hatred.” The *London Times*<sup>2</sup> characterized it as an “atrocious method of warfare,” and Sir John French in his report on the battle of Ypres described it as a “diabolical contrivance” forbidden by the Hague convention. This was likewise the view generally expressed by the American press.<sup>3</sup>

<sup>1</sup> *Times History of the War*, Vol. V, p. 70.

<sup>2</sup> Weekly edition, May 30, 1915.

<sup>3</sup> Cf. the collection of extracts from the leading American newspapers in the *Literary Digest* of May 8, 1915. The international committee of the Red Cross addressed a protest to the belligerent powers against the use of asphyxiating and poisonous gases as a cruel and barbarous method of warfare and appealed to them to refrain from their use in the future. Text in 45 *Clunet*, 774-776. The governments of the allied powers acknowledged with “the most sincere sympathy” the receipt of the appeal and stated that they associated themselves in the generous and truly humane spirit which had inspired the committee, and that they shared with it the sentiment of horror and of profound sadness which it expressed that science, instead of being applied for the relief of human misery, should be prostituted for purposes of destruction. Those who had first made use of such methods had assumed a heavy responsibility. But having once been adopted, it was impossible for the adversary not to have recourse to similar means and to endeavor to perfect them for his own defence. At the beginning of the war the allies believed and had a right to believe that such barbarous and cruel methods would not be employed by civilized nations, since they had through international conventions solemnly engaged not to employ such instrumentalities. But notwithstanding these engagements, the Germans had in April, 1915, employed asphyxiating gases in their attacks and had later made use of poisonous gas with cruel and frightful results. In this situation the allies were obliged to resort to new means for the protection of their soldiers against such methods and to permit them to combat the enemy with the instrumentalities which he had himself introduced. Should the belligerents engage to refrain from such methods, in the future, there was no reason to believe that the enemy would observe such an engagement. Nevertheless, if the German government would declare that it would discontinue the employment of gas and would offer guarantees for the observance of the undertaking, the allied governments would be prepared to examine the proposition in the most liberal spirit. French text in 45 *Clunet*, 1005-1007, and the *Journal de Genève*, May 14, 1916. The German government in its reply declared that the high command at the outset had refrained from resorting to cruel methods of warfare, but that the barbarous conduct of the enemy had driven it to adopt counter-measures; that English and French statesmen had publicly proclaimed that Germany must be destroyed; that the enemy had in fact made use of asphyxiating gas as early as March, 1915; and that in consequence Germany herself could not renounce this method of combat. Text of the German reply in 46 *Clunet*, pp. 860 ff.

§ 183. **Provisions of the Hague Conventions.** The rules of the Hague conventions which deal with the employment of noxious gases or poisoned weapons in war are the following:

1. "The contracting powers agree to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases;" 2. "Besides the prohibitions established by special conventions it is particularly forbidden (art. 23 of the convention respecting the laws and customs of war on land): (a) to employ poison or poisoned weapons; . . . (e) to employ projectiles or material of a nature to cause superfluous injury."

The first declaration adopted by the First Hague Conference and renewed by the second in 1907 was ratified or adhered to by all the powers represented at the Conference of 1899 except Great Britain, Portugal, and the United States; but Great Britain and Portugal, as has been said, gave their adhesion in 1907. All the European belligerents in the recent war and also Japan duly ratified the Declaration, as they also ratified that interdicting the use of expanding bullets, and it was therefore binding on all of them.

The phraseology of the declarations concerning the use of asphyxiating gases is, however, such that it might have been claimed by the Germans that the particular instrument employed by them was not contrary to the terms of the Declarations. In the first place, what the Hague acts forbid is *projectiles* and not generating tanks or cylinders, and even as to projectiles it is only those whose *sole* (*unique*) object is the diffusion of gases. Again, it is only *poisoned weapons* which are interdicted, i.e., bullets, projectiles, and other instruments which contain poison. None of these prohibitions, therefore, it might be contended, were aimed at the use of noxious fumes generated by apparatus in the trenches and which reach the enemy only by being blown against him by the wind. On the other hand, it may be argued that what the Hague Conference had in mind was not a particular instrument for introducing poisonous substances into the bodies of enemy troops, but the use in any manner of deleterious, asphyxiating, or poisonous substances which inflict cruel and superfluous suffering upon the victims. In fact, article 23 (c) of the conventions of 1899 and 1907 interdicts not only the employment of arms and projectiles, but also *material* calculated to cause unnecessary suffering.<sup>1</sup> At the time, the Con-

<sup>1</sup> Compare the views of M. Fauchille in 22 *Rev. Gén.*, p. 409, where the German defence is ridiculed as "hypocritical."

ference did not foresee the introduction of other agencies than bombs and projectiles for diffusing asphyxiating and deleterious gases, and consequently its acts were so phrased as to include only the instruments already in use.

Assuming, however, that the effect of asphyxiating gases generated from cylindrical tanks is to inflict *superfluous* injury upon the enemy, as the English and French contended, there remains an important difference between its use in this manner and its use through the medium of bombs and projectiles. Where the latter agencies are used for the diffusion of gases, those against whom they are directed have no means of avoiding the consequences; they cannot discern the approach of a bomb or projectile, or defend themselves by means of masks or respirators, as they may do in the case of slowly approaching clouds of gas fumes. The Germans, therefore, argued that the employment of an agency, contact with which the enemy might avoid by retiring or against the effect of which he might protect himself by means of masks or other contrivances, could not be regarded as one which is forbidden by the customs of civilized warfare.<sup>1</sup>

§ 184. **German Theory in Respect to Instrumentalities and Means; Views of von Clausewitz, von Hartmann, and von Moltke.** Karl von Clausewitz, the oracle from whom modern German militarists have drawn their inspiration and philosophy, in a ponderous treatise entitled *Vom Kriege*, published in 1832, sums up the German philosophy of war and elaborates in great detail the rules according to which war may be carried on.<sup>2</sup> He defends resort to violence and terrorism, warns against the baleful doctrines of philanthropists and humanitarians who think war can be prosecuted in a civilized manner, and refers cynically to the rules of international law as "self-imposed restrictions, almost imperceptible and hardly worth mention-

[<sup>1</sup> Cf., for example, the views of Müller-Meiningen in his book, *Der Weltkrieg und der Zusammenbruch des Völkerrechts* (English trans. under the title *Who are the Huns?* p. 256). Cf. also Wegener in his book, *Der Wall von Eisen und Feuer*, who asks: "Why should a stupefying gas which one can see openly and slowly approaching and before which he can retire be less humane than the invisible and unavoidable gases which are produced by bursting shells and which tear bodies into human shreds?" Quoted in *London Times History of the War*, Vol. V, p. 56.

<sup>2</sup> I have used an English translation by Colonel J. J. Graham, published in three volumes (London, 1916).

ing.”<sup>1</sup> Adverting to the object of war and the methods by which it may be carried on, he tells us that the first object is “invasion, that is, the occupation of the enemy’s territory, not with a view to keeping it but in order to levy contributions upon it or *to devastate it*.”<sup>2</sup>

Julius von Hartmann, a pupil of von Clausewitz and a distinguished cavalry general in the war of 1870-1871, in a series of articles entitled “Military Necessity and Humanity,” published in the *Deutsche Rundschau* in 1877-1878,<sup>3</sup> set forth the commonly accepted German view of military necessity and the objects to be accomplished by war. He criticised the liberal and enlightened views enunciated in Bluntschli’s code;<sup>4</sup> declared that war today must be conducted with a rigor more devoid of scruple and with a greater violence than in the past; that every means without restriction must be employed;<sup>5</sup> that the “shackles of a constraining legality” in the conduct of war only serve to paralyze belligerents and postpone the termination of hostilities;<sup>6</sup> that while war may be prosecuted humanely, it cannot be conducted in a “civilized” manner, as Bluntschli contended;<sup>7</sup> that humanity has a place in war only so long as it does not hinder the speedy attainment of the object of the war,<sup>8</sup> etc.

General von Moltke enunciated even more extreme views. “The great benefit in war,” he said, “is that it should be terminated as quickly as possible.” To this end it must be permitted to employ “*all* means except those which are positively condemnable.” (*Dazu müssen alle nicht geradezu verwerfliche Mittel freistehen.*) “I am in no sense in accord,” he adds, “with the Declaration of St. Petersburg when it pretends that the ‘weakening of the *military forces* of the enemy’

<sup>1</sup> Vol. I, p. 2.

<sup>2</sup> *Ibid.*, p. 33.

<sup>3</sup> *Militärische Notwendigkeit und Humanität*, *Deutsche Rundschau*, Vols. XIII-XIV.

<sup>4</sup> It is said that General von Hartmann was requested by the Prussian minister of war, who was much concerned at the doctrines set forth by Bluntschli, to combat them with a view to counteracting their possible dangerous effect in Germany. Cf. Saint Yves, *Les Responsabilités de l’Allemagne dans la Guerre de 1914*, p. 338.

<sup>5</sup> Vol. XIV, pp. 76, 89.

<sup>6</sup> *Ibid.*, Vol. XIII, pp. 119, 122.

<sup>7</sup> *Ibid.*, p. 123.

<sup>8</sup> *Ibid.*, p. 466.

constitutes the only legitimate object of war. No, it is necessary to attack all the resources of the enemy government: his finances, his railroads, his stock of provisions, and even his prestige.”<sup>1</sup>

§ 185. Views of the *Kriegsbrauch im Landkriege*. Such extreme views as the above were, as is well known, set forth in the German *Kriegsbrauch im Landkriege*, of 1902. Regarding instrumentalities and methods it declares that all measures may be employed to overcome the enemy which are necessary “to attain the objects of the war” and that they include both “force and stratagem.”<sup>2</sup> Again, “every means may be employed without which the object of the war cannot be attained; what must be rejected, on the other hand, is every act of violence and destruction which is not necessary to the attainment of this end.” Again, “all means which modern inventions afford, including the most perfected, the most dangerous, and those which destroy most quickly the adversary *en masse* are permissible; and since these latter result most promptly in the attainment of the object of the war they must be considered as indispensable and, all things considered, they are the most humane.”<sup>3</sup> It is quite clear that the authors of the German manual regard military effectiveness rather than considerations of humanity the test of the legitimacy of an instrument or measure. Therefore, any instrument or method, the employment of which will contribute to the speedy attainment of the object of the war, is permissible, whatever may be said against it on humanitarian grounds, and if its use results in the shortening of the duration of the war, it is for that reason the most humane.

§ 186. Views of Contemporary German Militarists and Publicists. Similar views have been more recently expressed by

<sup>1</sup> Letter of December 11, 1880, to Bluntschli. German text in Moltke's *Gesammelte Schriften und Denkwürdigkeiten*, Bd. V, S. 194; French text in the *Rev. de Droit Int.*, Vol. XIII, p. 81.

<sup>2</sup> Morgan, p. 84, translates the German words as “violence and cunning,” but Carpentier, p. 20, more accurately renders them as *la force et la ruse*.

<sup>3</sup> Morgan, p. 85; Carpentier, p. 21. The *Kriegsbrauch* admits that certain instruments and practices are prohibited, because their use causes unnecessary suffering. These include poison, assassination, proscription, and the use of weapons which cause needless suffering, such as soft-nosed bullets, glass, etc. (Morgan, p. 86). But the hiring of a third person to assassinate an enemy is defended (*ibid.*, p. 114).

Generals Colmar von der Goltz,<sup>1</sup> von Blüme,<sup>2</sup> von Bernhardi,<sup>3</sup> von Hindenburg,<sup>4</sup> von Bissing,<sup>5</sup> Marshal Prince Schwarzenberg,<sup>6</sup> General Disfurth,<sup>7</sup> and others. Such opinions, it may be added, are not confined to the militarists, but have frequently been enunciated by German statesmen and writers on international law. Thus the Imperial Chancellor stated in an address to the *Reichstag* in March, 1916, that "every means calculated to shorten the war constitutes the most humane policy to follow. When the most ruthless methods are considered best calculated to lead us to victory, and a swift victory, they must be em-

<sup>1</sup> Cf. his book *Das Volk im Waffen*. I have used a French translation by E. Jaeglé entitled *La Nation Armée* (5th ed., 1884). Von der Goltz quotes with approval von Clausewitz's cynical references to the philanthropists and humanitarians, and lays down the proposition that the object of war is the "total defeat" of the enemy, and that to this end a belligerent may employ "all means material and intellectual, to overcome his adversary." (Pp. 3, 7.)

<sup>2</sup> Cf. his book, *Die Strategie* (2d ed., 1886).

<sup>3</sup> Notably in his *Vom Heutigen Kriege* (1912), and his *Deutschland und der nächste Krieg* (1912).

<sup>4</sup> "One cannot," says Hindenburg, "make war in a sentimental fashion. The more pitiless the conduct of the war, the more humane it is in reality, for it will run its course all the sooner. The war which of all wars is and must be the most humane is that which leads to peace with as little delay as possible." Interview in the *Neue Freie Presse* of Vienna, reproduced in the *Berliner Tageblatt* of November 20, 1914, and quoted in Somville's *The Road to Liège*, p. xi, and in Saint Yves, *op. cit.*, p. 346.

<sup>5</sup> Speaking on August 29, 1915, at Münster, of the extreme measures which the Germans had felt obliged to take against the civil population of Belgium, General von Bissing said: "The innocent must suffer with the guilty. In the repression of infamy, human lives cannot be spared and if isolated houses, flourishing villages, and even entire towns are annihilated, that is regrettable, but it must not excite ill-timed sentimentality. All this must not in our eyes weigh as much as the life of a single one of our brave soldiers . . . the rigorous accomplishment of duty is the emanation of a high *Kultur*, and in that, the population of the enemy countries can learn a lesson from our army." *Kölnische Zeitung*, September 8, 1914. Text in Langenhove, *The Growth of a Legend* (1916), p. 254, and in Somville, *op. cit.*, p. 2. General von Bissing, after his appointment as governor-general of Belgium, repeated in substance the above opinion to a Dutch journalist. The interview is published in the *Düsseldorfer Anzeiger* of December 8, 1914.

<sup>6</sup> Cf. his interview in the *Continental Times* of September 17, 1914, where he declares among other things that war and humanity are two entirely incompatible conceptions.

<sup>7</sup> "War is war and it must be waged with severity. The commonest, ugliest stone placed over the grave of a German grenadier is a more glorious and venerable monument than all the cathedrals in Europe put together. They call us barbarians. What of it? For my part, I hope that in this war we have merited the title of barbarians. Our troops must achieve victory. What else matters?" *Hamburger Nachrichten* of November, 1914, quoted by Sir Gilbert Parker in his *The World in the Crucible*, p. 80.



ployed.”<sup>1</sup> In a note of January 31, 1917, addressed to the secretary of state of the United States, the German ambassador at Washington, defending Germany’s resumption of unrestricted submarine warfare, declared that Germany was “now compelled to continue the fight for existence with the full employment of all weapons which are at its disposal.”<sup>2</sup>

§ 187. **The More Enlightened View.** The employment of new and powerful inventions of destruction or of new methods is, of course, not to be condemned and ruled out merely because they are new or because they are more effective than those formerly employed, as a few sentimentalists in every age have wished to do. The true test of their lawfulness is rather whether they can be employed without inflicting superfluous injury upon those against whom they are employed, whether they “uselessly aggravate the sufferings of disabled men,” whether their effect is cruel and inhumane, and the like.<sup>3</sup>

The principle laid down in the Declaration of St. Petersburg of 1868 “that the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy; that for this purpose it is sufficient to disable the greatest number of men,” and that the employment of arms which needlessly aggravate the sufferings of disabled men or render their death inevitable, may possibly go too far in subordinating the necessities of war to the requirements of humanity, but it undoubtedly represents the view of a large portion of the civilized world.<sup>4</sup>

The preamble to the Hague convention respecting the laws

<sup>1</sup> Quoted in the Springfield (Mass.) weekly *Republican*, January 8, 1917.

<sup>2</sup> Official text published by the department of state.

<sup>3</sup> Cf. Spaight, p. 75; Oppenheim, Vol. II, p. 117, and Hall, 6th ed., p. 526.

<sup>4</sup> The German theory of means and methods was recently supported by Major John Bigelow, a retired officer of the United States army, in two articles published in the *New York Times* (August 8 and September 5, 1916). Major Bigelow asserted that “whatever is effective, whatever tends to shorten a war, is legitimate; whatever is ineffective and whatever does not tend to shorten it, on the other hand, is wanton and illegitimate.” He admits, however, that the right of a belligerent to act upon such a principle may be limited by international law, but until then he is free to employ any instrument or method, without regard to its humanity or inhumanity. Major Bigelow further lays down the somewhat extraordinary proposition that the rights of belligerents are older than those of neutrals and are, therefore, entitled to precedence over the latter. These inadmissible propositions are effectively refuted by Professor Munroe Smith in the *Times* of August 27 and September 8.



and customs of war on land recites that the conference was animated in all of its deliberations by a desire to define the laws of war with greater precision and to confine them within such limits as to mitigate their severity, as far as possible, with a view to serving the interests of humanity and the ever progressive needs of civilization. At the very head of the chapter on "the means of injuring the enemy" we find a declaration that "the right of belligerents to adopt means of injuring the enemy is not unlimited."<sup>1</sup> This principle is affirmed by the military manuals of the United States, Great Britain, France, and other countries,<sup>2</sup> and it is the view of the great majority of military writers and authorities on international law.<sup>3</sup>

<sup>1</sup> Art. 22.

<sup>2</sup> *American Rules*, arts. 172, 173; *British Manual*, art. 39; *French Manual*, art. 56.

<sup>3</sup> The whole subject of the means which a belligerent may employ to overcome the enemy is luminously treated by Pillet, *Les Lois Actuelles de la Guerre*, chs. IV and V, and by Spaight, *War Rights on Land*, ch. IV. Spaight aptly remarks that "the civilized world has signed and sealed its approval of two great principles, the first, that the sole end of war is the overcoming of the military forces of the enemy; the second, that to the means which may be adopted to secure this end, certain restrictive laws apply." He adds, however, that in practice the text of the lawfulness of any weapon is the answer to the question: "What is the bag?" If the effectiveness in disabling the enemy is so great as to offset the suffering which it causes, it is regarded as a lawful instrument (p. 76). This passage is quoted with approval by Grahame-White and Harper in their *Air Craft and the Great War* (p. 167). Aerial warfare, they say, has been condemned because, militarily speaking, it has been a failure, that is, the "bag" has not been sufficiently large to justify the injuries which have been inflicted upon non-combatants and private property. The German jurist von Bar, at the meeting of the Institute of International Law in 1911, condemned the employment of air craft as an instrument of combat for the same reason. The legality of an invention of war, he argued, must be judged from two standpoints: (1) its efficacy, and (2) its humanity. If the efficacy is not sufficient to offset its inhumanity, it ought not to be employed. *Annuaire*, Vol. 24, p. 129.

## CHAPTER XI

### *FORBIDDEN WEAPONS AND INSTRUMENTALITIES (Continued)*

§ 188. Use of Shells Charged with Asphyxiating and Poisonous Gas; § 189. Use of Liquid Fire; § 190. Charges in Respect to the Poisoning of Wells; § 191. Employment of Uncivilized Troops; § 192. The German Protest; § 193. Examples of Former Wars; § 194. Conclusion.

§ 188. **Use of Shells Charged with Asphyxiating and Poisonous Gas.** Very different from the employment of noxious gases in the manner described in the preceding chapter was the use of shells which upon exploding emit poisonous fumes. Sir John French in his report on the use of asphyxiating gases stated that "the gases employed by the Germans have been ejected from pipes laid in the trenches, and they have also been produced by the explosion of *shells* especially manufactured for the purpose."<sup>1</sup>

The gas, it was stated, was produced from a compound composed largely of chlorine mixed with other chemicals. The shells were fired usually when the wind was blowing in the direction of the enemy, and the fumes which were emitted upon explosion caused smarting of the eyes at a distance of two miles behind the trenches and were so deadly in effect that the Germans were compelled to wait for some time before occupying the evacuated trenches.

On April 21, 1915, the British war office charged that the Germans had violated the laws of civilized warfare during their recapture of hill 60 east of Ypres, by employing shells which

<sup>1</sup> In May, 1918, it was reported that the Germans had devised and were using a new explosive shell charged with a powder which percolated through the gas masks of the enemy, causing the victims to sneeze and to tear off their masks after which they were exposed to the full effect of the poisonous gases which were emitted from other shells fired at the same time. *New York Times*, May 7, 1918.

At that time it was stated that the Germans were employing gases in four different ways: (1) by generating clouds of gas to be blown against the enemy by the wind; (2) diffusion by means of projectiles; (3) by means of long-range artillery gas shells; and (4) by means of hand grenades.

emitted asphyxiating gases. They were also charged with bombarding Armentières in August, 1917, with shells of this character. The shells were described as containing a colorless liquid which upon evaporation produced heavy poisonous fumes which penetrated houses and cellars and made victims of the inhabitants who took refuge therein. According to the press despatches the effects were so deadly that the population of the town had to be removed.<sup>1</sup> In April, 1918, the Germans in the course of a single night attack between Armentières and La Basse threw, according to reports, sixty thousand shells charged with "poisonous" gas upon the British.

The German newspapers as early as April, 1915, admitted that German troops were employing shells of this character, but as usual defended their use as a legitimate act of reprisal against the enemy for having first made use of them.<sup>2</sup> Moreover, they contended, the shells thus used were not those whose *sole* purpose was the diffusion of asphyxiating or poisonous gases, the gases emitted being merely incidental to the explosion of the shell. These shells, it was added, were no more deadly than the poison of the English explosives, since they took effect over a wider area, produced a quick death, and spared the victims of torn bodies and of needless suffering.<sup>3</sup>

As evidence in support of the charge that the allied troops had made use of such shells before the Germans employed them certain instructions were cited which were alleged to have been issued by the French ministry of war on February 21, 1915, in which it was said that "The so-called shells with stupefying gases that are being manufactured by our central factories contain a fluid which streams forth after the explosion, in the form

<sup>1</sup> New York *Times*, August 10 and 12, 1917. In April, 1916, German aviators were charged with dropping "asphyxiating bombs" during the course of a Zeppelin raid over London. New York *Times*, April 3, 1916.

<sup>2</sup> In a statement issued by the German war office on April 22, 1915, the charge was made that "our enemies have been making use of this means of warfare for many months." *The Frankfurter Zeitung* was quoted in the press despatches of April 25, 1915, as saying: "It is indeed possible that our bombs and shells rendered it impossible for the enemy's troops to remain in their trenches or artillery positions, and it is even probable that, in point of fact, projectiles emitting poisonous gases were employed by us, for the German army commander has permitted no doubt to exist that, as a reply to the treacherous projectiles of the English and French, which have been constantly observed for many weeks, we on our side also would employ gas bombs or whatever one may call them."

<sup>3</sup> London *Times History of the War*, Vol. V, p. 55.

of vapors that irritate the eyes, nose, and throat. There are two kinds: hand grenades and cartridges." Then followed a description of both instruments. The grenades were described as weapons which were thrown by hand and which exploded seven seconds after the lighting of the fuse. The cartridges, on the other hand, were to be fired from rifles, and they, too, exploded shortly after leaving the gun.

"Here we have," said a statement issued by the *Wolff Telegraph Bureau* and published in the German press of June 25, 1915, "conclusive proof that the French in their State workshops manufactured shells with asphyxiating gases fully half a year ago at least. The number must have been so large that the French war ministry at least found itself obliged to issue written instructions concerning the use of this means of warfare." The French ministry of war promptly denied the accusation. A German-American writer charged that bombs emitting asphyxiating gases continued to be used by the French. The evidence was placed, he alleges, before the department of state at Washington, but was "quietly pigeon-holed," and the American press refused to "arouse the moral indignation of the country against this glaring infraction of the stipulations of the Hague convention. If, therefore, the patience of the Germans broke at last and they had recourse to bombs — which as yet is not proven — they are free from guilt."<sup>1</sup>

Whether the omission of the American government to take action in regard to the charges filed with it was due to the insufficiency of the evidence, or whether the acts complained of were not such as to justify its intervention is not known; but that it was not indifferent to the manufacture in the United States of war materials, the use of which is forbidden by the Hague conventions, was shown by the action taken in regard to the complaint of the German government that the Remington and Union Metallic Cartridge Companies were manufacturing such shells with a view to exporting them to one of the belligerents.

Both the British and French governments emphatically denied having made use of any shells forbidden by the Hague conven-

<sup>1</sup> Von Mach, *Germany's Point of View*, pp. 388-389. Cf. also the accusation of E. Stauffen, "A Loyal American Citizen of Teutonic Origin" in *Europe Bled White*, p. 77.

tion until after the Germans had repeatedly violated the convention by themselves employing such instruments. Thereafter the Entente allies appear to have made use of shells of a somewhat similar character, and they justified their action as a legitimate measure of reprisal. One point is clear, namely, that the belligerent which first had recourse to this agency of attack violated the convention; for it plainly forbids the employment of projectiles which diffuse asphyxiating or deleterious gases, and it would seem that no reasonable distinction between "projectiles" and "shells" can be drawn. When, however, one belligerent declined to observe the convention, his adversary was unquestionably within his legal rights in retaliating in kind, however regrettable the necessity of resorting to reprisals may be.

§ 189. **Use of Liquid Fire.** Another instrument used for the first time during the recent war and against the lawfulness of which there was more or less protest, was the "liquid fire projector" or "flame-thrower" (*Flammenwerfer*) employed for the first time by the Germans during their operations against Verdun in March, 1916, and on various other subsequent occasions. This instrument consisted of a small tank filled with an inflammable composition liquid under high pressure and strapped to the back of the soldier using it. Connected by a swivel joint with the bottom of the tank was a hose pipe with a valve and a nozzle, to which was attached an igniting apparatus. By opening the valve and igniting the composition, a stream of fire with intense heat could be projected twenty or thirty yards.<sup>1</sup>

Although an instrument mainly for hand-to-hand combat, the flame projector was found to be an effective weapon in trench fighting, especially where the distance between trenches was short. The effect of the liquid flame upon those against whom it was directed was deadly, the victims sometimes being burned to a crisp.

<sup>1</sup> They are thus described by a German army order issued at St. Quentin, October 16, 1914: "The flame projectors (*Flammenwerfer*), which are very similar to portable fire-extinguishers, are worked by specially trained pioneers and throw a liquid which at once catches fire spontaneously. The jet of fire has an effective range of 30 metres. The effect is immediate and deadly, and the great heat developed forces the enemy back a long way. As they burn on for one and a half to two minutes, and can be stopped whenever necessary, short and isolated jets of flame are advisable, so that one charge is sufficient to spray several objectives. Flame projectors will be mainly employed in street and house-to-house fighting, and will be kept in readiness at the place from which an attack starts." Text in Bland, *op. cit.*, pp. 289-290

The French government in a memorandum of April 24, 1915, transmitting to the army the German document (referred to above) containing directions for the use of liquid fire projectors, stigmatized it as an "abominable method, contrary to all the undertakings solemnly given by the German Imperial government to the other powers and in contempt of all the sentiments of humanity."<sup>1</sup> "No government," it added, "could remain defenceless against such refinements of barbarity without endangering the safety of its troops, and accordingly the French government will adopt means to prevent German soldiers and military authorities from committing their premeditated crimes and murders."<sup>2</sup> Thereafter British, French, and American soldiers retaliated in kind.<sup>3</sup>

The use of such an instrument is not forbidden by the Hague conventions unless it may be brought within the category of "material of a nature calculated to produce superfluous injury." While the effect may be more deadly than bullets or shells, we can hardly say that it is any the less permissible. Indeed, owing to its very limited radius of action and the visibility of the flame, the chances of escape are greater than where the instruments employed are projectiles or shells.

§ 190. **Charges in Respect to the Poisoning of Wells.** In 1915 General Botha, commander of the armed forces of the South African Union, charged the Germans in Southwest Africa with poisoning certain wells from which the English drew their water supply. In a report to the secretary of state for the colonies, General Botha says he discovered at the time of the occupation of Swakopmund on January 14, 1915, that six such wells had been poisoned by means of bags of arsenical cattle dip,

<sup>1</sup> Text in Bland, *op. cit.*, p. 288.

<sup>2</sup> *Ibid.*, p. 290.

<sup>3</sup> According to a press despatch of September 15, 1917, from France, French inventors had devised some twenty different types of "flame-throwers," but they had found them to be largely useless, and too often the soldiers employing them were themselves the victims rather than the enemy.

The London weekly *Times* of July 20, 1917, contains an account of an exhibition in the presence of the king of "boiling oil" projectors, used by British troops, which threw "great floods of flaming liquid" that "charred or devoured whatever it touched." A Washington despatch of September 29, 1917, announced that "plans had been made by the general staff of the army, with the approval of the President and the war department, for the American forces to use gas and liquid flames when they begin operations against the Germans. The use of such methods by the enemy forces the United States to retaliate with similar measures."

some of which he himself found in the wells. On February 13 he addressed a letter to lieutenant-colonel Franke, commander of the German forces, drawing his attention to the fact that such an act was contrary to article 23 (a) of the Hague convention respecting the laws and customs of war on land (which forbids the use of poison or poisoned weapons) and informing him that if the practice were persisted in, he would hold the officers concerned responsible and would be reluctantly compelled to resort to such measures of reprisal as might seem advisable. At the same time he expressed the hope that "the continuation of such a disgraceful practice would be sternly discountenanced." On February 21, colonel Franke replied that the troops under his command had been given orders,

"if they could possibly prevent it, not to allow any water supplies to fall into the hands of the enemy in a form which allows such supplies to be used either by man or beast. Accordingly, the officer in charge when Swakopmund was evacuated had several sacks of cooking salt thrown into the wells. But we found that the salting of the water could in a short time be rendered ineffective. Thereafter we tried the cattle dip, and we found that, by using this material, an enemy occupying the town would for some time have to rely on water brought from elsewhere."

He also added that instructions had been given that the wells so "treated" should be marked by warning notices, and that a staff officer had inspected what had been done.

To this communication General Botha replied expressing regret that the use of poison had apparently received the approval of the German military authorities, and he added that the offence was in no degree lessened by the display of warning notices. In fact, he alleged, no such notices had been found when Swakopmund was occupied, and he repeated the threat that he would hold the commanding officer responsible.

On March 11 colonel Franke replied that he was unable to agree with General Botha's interpretation of article 23 (a). Poisoning he understood to mean the *secret* adding of matter injurious to the health of human beings. What had been done was done with his permission and would continue to be done; it was nothing more than "effecting a change in the natural condition of the water in order to deprive the enemy of the use of this means of existence."

In a letter of March 22, 1915, General Botha informed colonel



Franke that he was in possession of a communication addressed by captain Kruger of the German protectorate troops to a subordinate, instructing a patrol to "infect thoroughly with disease the Ida mine." The only conclusion possible, he said, was that water had again been poisoned by the introduction of bacterial matter designed to produce an epidemic of disease. This, he added, "was a gross breach of the laws of civilized warfare and a cowardly method of injuring an enemy, to which no soldier should stoop."

On June 19 General Botha addressed a letter to the German Imperial governor of Southwest Africa, Dr. Seitz, calling his attention to "another instance of water poisoning by the German troops," namely, the poisoning of two wells on the Swakopmund river early in May.<sup>1</sup> To this communication governor Seitz replied that the retiring troops of the army of the protectorate had with his sanction rendered the wells "useless," but that no poison had been employed. Owing to the lack of other means, however, in a few isolated cases cattle dip had been used; but in all such cases warning signs had been posted. "I must place on record," he added, "that water places in our country have to be regarded as war material which is of assistance to the enemy and may therefore be destroyed or rendered useless."<sup>2</sup>

It will be seen from the above correspondence that the German authorities admitted having rendered the water of numerous wells unfit for drinking purposes, generally by means of cattle dip, which, though not necessarily a deadly poison, nevertheless

<sup>1</sup> The London weekly *Times* of May 5, 1915, charged that "since the evacuation of Aus, Warmbad and other places, the German troops have consistently poisoned all the wells along the railway lines in their retirement."

<sup>2</sup> The official correspondence relating to the alleged poisoning of wells in Africa may be found in a British blue book entitled *Papers Relating to German Atrocities and Breaches of the Rules of War in Africa*, presented to both houses of Parliament in July, 1916, Cd. 8306, pp. 74 ff. Cf. also the London weekly *Times*, May 5, 1915. The Germans were also charged with having poisoned the wells in certain villages (e.g., Barleux) in the Somme region of France before their retreat in the spring of 1917 and with having filled others with dung and creosote soda. Cf. a facsimile of a German order directing that the wells at Bancourt be so treated, in a brochure entitled *Frightfulness in Retreat* (Stodder and Houghton, London, 1917), p. 62. Charges were also made that the Germans were guilty of poisoning wells before evacuating various places in Belgium and France in the autumn of 1918. *New York Times*, November 7, 1918. One of the terms of the armistice (November, 1918) was that the German command should be responsible for revealing "all destructive measures that may have been taken (such as poisoning or polluting of springs, wells, etc.) under penalty of reprisals."

contained poisonous substances injurious to the health and life of those who drank the water to which it had been added. Whether warning notices were displayed and other measures taken to safeguard the health and lives of the inhabitants, as the Germans claim was done, but which General Botha denied, is a question of fact concerning which the evidence available is not sufficient to justify an opinion.

Prohibition of the use of poison is one of the oldest rules of warfare,<sup>1</sup> and civilized people have always regarded its use in warfare with abhorrence.<sup>2</sup> The cutting off of the water supply upon which an army is dependent is, however, a legitimate measure, and the diversion of streams which supply besieged places is not an unusual method of compelling the inhabitants to surrender.<sup>3</sup>

It might be contended that such a measure differs but little if any in principle from the destruction of the enemy's water supply by the introduction of poison in the wells from which it was drawn, especially if they are adequately marked. If the purpose and effect were merely to deprive the armed forces of the enemy of their source of water supply, it would seem that such a measure is unobjectionable. But where the evacuating forces poison the wells upon which the civil population are dependent, even when safeguards are taken to warn them, the case is somewhat different. As a belligerent may not lawfully requisition for his use the entire food supply, leaving the inhabitants to starve, so it may be doubted whether he has a right to destroy their water supply, which is as essential to their existence as food.

The American *Rules of Land Warfare* go to the length of interpreting the prohibition of the Hague convention in respect to the use of poison to include "the deliberate contamination of sources of water supply by throwing into same dead animals and all poisonous substances of any kind."<sup>4</sup> This interpreta-

<sup>1</sup> Cf. Hershey, *Essentials of International Public Law*, p. 29. The Italians charged the Turks with infecting wells with typhus bacilli during the Turco-Italian war of 1911-1912, but the charge was denied by the Turks. Cf. Coquet, *La Guerre Italo-Turque*, *Rev. Gén. de Droit Int. Pub.*, 1913, p. 25.

<sup>2</sup> Cf. Lawrence, *Principles*, § 209.

<sup>3</sup> British *Manual of Military Law*, p. 243; American *Rules*, art. 177; Spaight, *War Rights on Land*, p. 84.

<sup>4</sup> Art. 177.

tion would seem to prohibit such acts as those of the Germans in filling the wells in the Somme region during their retreat with manure and creosote soda, since the effect was to destroy not merely the water supply of the armed forces of the enemy, but also that of the civil population and to expose them to the danger of disease.

§ 191. **Employment of Uncivilized Troops.** Such were some of the instrumentalities employed by the various belligerents against their adversaries. Complaint was also made by each against the other of the employment of troops whose character did not conform to the standards which the laws and customs of civilized warfare prescribe as the test of lawful combatants. The German Imperial foreign office in July, 1915, issued a white book entitled *Employment Contrary to International Law of Colored Troops upon the European Arena of War, by England and France*,<sup>1</sup> in which it was charged that England and France were

"relying not only upon the strength of their own people, but were employing large numbers of colored troops from Africa and Asia in the European arena of war against Germany's popular army: Gurkhas, Sikhs and Panthans, Sepoys, Turcos, Goums, Moroccans, and Senegalese to fill the English and French lines from the North Sea to the Swiss frontier. These people, who grew up in countries where war is still conducted in its most savage forms, have brought to Europe the customs of their countries; and under the eyes of the highest commanders of England and France they have committed atrocities which set at defiance not only the recognized usages of warfare, but of all civilization and humanity."

Among the exhibits reproduced in the white book is a collection of depositions by German witnesses, facsimile reproductions of extracts from diaries and letters of French and Belgian soldiers, and photographs of mutilated bodies, amputated ears, and the like.

"It is evident," the white book says, "that the colored allies employed by England and France upon the European arena of war have the barbarous practice of carrying with them as war trophies the severed heads and fingers of German soldiers, and wearing as ornaments about their necks, ears which they have cut off.<sup>2</sup> On the battle fields they creep up stealthily and treacherously upon the German wounded, gouge their eyes out, mutilate their faces with knives, and cut their throats. Indian troops

<sup>1</sup> *Völkerrechtswidrige Verwendung farbiger Truppen auf dem Europäischen Kriegsschauplatz durch England und Frankreich*, p. 35.

<sup>2</sup> Cf. Appendices 1 to 7 of the above-mentioned white book.

commit these atrocities with a sharp dagger which is fastened in the sheath of their side-arms. Turcos, even when wounded themselves, creep around on the battle field and like wild beasts murder the defenceless wounded." <sup>1</sup>

§ 192. **The German Protest.** The German government, therefore, solemnly protested against

"the bringing into the field against Germany of troops whose savagery and cruelty are a disgrace to the methods of warfare of the twentieth century. The government bases its protest upon the spirit of international agreements of the past few decades, which expressly make it a duty of civilized peoples 'to lessen the inherent evils of warfare' and 'to serve the interests of humanity and the ever progressive demands of civilization.' In the interest of humanity and civilization, therefore, the German government demands most emphatically that colored troops be no longer used upon the European arena of war." <sup>2</sup>

The Hague convention does not forbid the employment of colored troops in regular armies, but among the essential conditions which it lays down as entitling militia and volunteer forces to be treated as lawful belligerents is that they shall "conduct their operations in accordance with the laws and customs of war." <sup>3</sup> No one would, it may be presumed, argue that this condition is any the less essential in the case of regular troops.

<sup>1</sup> Appendices 7 to 14. One witness deposed that a North African soldier exhibited a string of putrid pieces of flesh which he drew from the pockets of his baggy trousers, and which proved to be twenty-one ears of Germans whom he had shot and which he intended to carry home as trophies. Another carried the head of a German soldier (p. 3). Another witness found in the pockets of a captured Turco six fingers with rings on them and also a human head (p. 5.) Another saw a Turco draw from the side pocket of his cape a cord on which were strung six or eight ears of *Boches* (p. 6).

Richard Grasshoff, a German writer, states in his *Tragedy of Belgium*, p. 184, that he saw twenty-three human ears which a Turco had cut off from wounded German soldiers. On another occasion he claims to have seen a Turco exhibit the entire head of a German soldier which he was carrying around as a trophy of his prowess as a soldier.

<sup>2</sup> Cf. also the *Norddeutsche Zeitung* of October 7, 1915, for a protest against the employment by the French of North Africans. This article charges that the French kept the Mohammedans in ignorance of the proclamations of the Holy War against England and France, by the Padishah, in order to prevent them from going over to the side of the Germans. Indian troops, it says, received quantities of literature printed in their own dialect and dropped in their midst by German aviators. Apparently the purpose was to induce the Mohammedan troops to desert the allies and take the side of Germany and her allies, all of which indicates that the Germans were not adverse to employing, themselves, the troops against whose use by the enemy they solemnly protested.

<sup>3</sup> Art. 1, par. 4 of the Hague *réglement* respecting the laws and customs of war on land.

Prohibition of the employment of savage troops who do not respect the laws of humanity or the rules of civilized warfare or whose excesses cannot be restrained by their commanders has so long been a recognized rule of civilized warfare that it has never been deemed necessary to affirm it in express terms in the international conventions respecting the conduct of war. Ever since Lord Chatham's famous protest against the employment by the British government of Indians in the colonial wars of North America,<sup>1</sup> publicists and statesmen of all countries have condemned the use of troops of an inferior civilization, whose savage instincts and manner of life make it improbable that they will observe the rules of civilized warfare.<sup>2</sup>

§ 193. **Examples of Former Wars.** But while there is a general agreement that the employment of savages or semi-barbarous men as combatants is unlawful, there is no agreement as to what particular races fall within the category of forbidden troops. As is well known, the people of the South protested against the employment of negro troops in the Federal armies during the Civil war, and charges were made that the latter were not always treated as lawful combatants when they fell into the hands of their captors.<sup>3</sup> The objection, however, appears not to have been based so much on the fear that they could not be restrained from savage excesses, as on the assumption that it was not a proper measure for a belligerent to arm and use the slave population of the enemy against their former masters. The employment of the Bashi-Bazouks and Circassians by the Turks and of Cossacks by the Russians during the Russo-Turkish war of 1877-1878 provoked much criticism, on the ground that they were not sufficiently civilized and disciplined to make it possible for their commanders to restrain them from acts of cruelty, pillage, and the like.<sup>4</sup> During the Boer war, Kaffirs were employed from the outset as spies and as wagon drivers, and although the British commanders at first discouraged their enlistment in the fighting

<sup>1</sup> Text in Hansard, *Parliamentary Debates*, Vol. XIX, pp. 487-498.

<sup>2</sup> Cf. Bordwell, *Law of War*, pp. 51, 232.

<sup>3</sup> Cf. Draper, *History of the Civil War*, Vol. III, pp. 216 ff.; Rhodes, *History of the United States*, Vol. V, p. 510, and Spaight, *War Rights on Land*, pp. 66 ff.

<sup>4</sup> Wheaton, *International Law* (Boyd's ed.), § 344a. Martens, however (*Paix et la Guerre*, p. 357), defends the Cossacks against the charge of being uncontrollable.

ranks, they joined the British forces on several occasions and helped them to repel the attacks of the Boers. Later they were armed by the British and regularly employed in military operations. Against this the Boers protested and resorted to reprisals which in some cases amounted to downright murder.<sup>1</sup> The employment by Japan during the Russo-Japanese war of certain Manchurian bands known as Chunchuses was a subject of protest by the Russian government. Nina Kawa, a Japanese writer, approved the Russian protest and declared that "their employment is a disgrace to the Japanese nation, since the Chunchuses are barbarians, criminals, and pillagers,"<sup>2</sup> but Ariga was of a contrary opinion.<sup>3</sup>

African troops (Turcos) appeared to have been first used as combatants in Europe by the French in the Austro-Italian war of 1859. They were also made use of by the French in the war against Germany in 1870-1871. The Germans protested in 1870, as the Austrians had done in 1859. In a circular addressed by Bismarck on January 9, 1871, to the foreign governments represented at Berlin, he charged the Turcos and Arabs with "cruelties," such as cutting off the heads, noses, and ears of the dead and wounded, and with "sexual bestialities," for which, however, they were less responsible than the government of France, which with full knowledge of their standards of civilization and their habits "brought these African hordes upon a European arena of war."<sup>4</sup>

§ 194. Conclusion. It may be doubted whether there is any ground save that of expediency or policy against employing the regularly organized and disciplined regiments of India and

<sup>1</sup> Spaight, pp. 70-71; London *Times History of the South African War*, Vol. V, pp. 251, 437, 450.

<sup>2</sup> Quoted by Ariga, *La Guerre Russo-Japonaise*, pp. 268 ff.

<sup>3</sup> *Ibid.*, p. 270. During the Turco-Italian war of 1911-1912 the Italians dealt severely with Arabs captured at Tripoli and Benghazi, a considerable number of them being summarily executed. Against this measure the Turkish government entered a vigorous protest. It does not appear, however, that the action of the Italian authorities was based on the contention that the Arabs were unlawful belligerents because of their semi-civilized character, but rather because they took up arms and resisted the authority of the Italian forces in occupied territory. On the contrary, it appears that those who took up arms in *unoccupied* territory were treated as lawful combatants. It has been pointed out, however, that the executions took place before the Italian decree annexing Tripoli had been issued. Coquet, *La Guerre Italo-Turque*, *Rev. Gén. de Droit Int. Pub.*, 1913, pp. 9-16.

<sup>4</sup> Cf. also the denunciation by the German general staff in the *Kriegsbrauch im Landkriege* (Morgan's trans., p. 88).



of North Africa against European troops any more than there is against the employment of negro troops in the armies of the United States.<sup>1</sup> But as to the employment of those who have never served in the regular forces, who are ignorant of or indifferent to the rules of civilized warfare, and who are not amenable to discipline there is more doubt.<sup>2</sup> The answer to the question requires a more intimate knowledge of the character of the particular troops than most American writers on international law possess. A correspondent of the London *Daily News* described the Turcos he saw at Paris in 1870 "as mild in demeanor and in visage as orthodox curates."<sup>3</sup> Ex-Senator Beveridge, who saw numbers of them in France in 1915, however, entertained a less favorable opinion of their gentleness and inoffensiveness.<sup>4</sup> Concerning the South African native troops there appears to have been no criticism.<sup>5</sup>

<sup>1</sup> Cf. in this connection the following from Treitschke (*Politics*, Eng. trans., 1916, Vol. II, p. 609): "It is equally impossible to deny to a belligerent State the right of employing all its troops in the field whether they be savage or civilized men. It is important to take an unbiassed view of ourselves in this question in order to guard against prejudice in respect of other nations. The Germans raised a fearful outcry against the French for letting loose the Turcos against a civilized nation in the last war. It was a natural accusation in the passion of the moment, but our calmer judgment can find no violation in what was done. The principle stands that a belligerent State may and must throw all of its physical resources into the struggle."

<sup>2</sup> Cf. the following from the British *Manual of Military Law* (ch. 14, § 38, p. 342): "Troops formed of colored individuals belonging to the savage tribes and barbarous races should not be employed in a war between civilized States. The enrolling, however, of individuals belonging to civilized colored races and the employment of whole regiments of disciplined colored soldiers (e.g., troops of the Indian army, the African troops of the French army, and the negro regiments of the United States army) is not forbidden." The American *Rules of Land Warfare* (art. 41) authorize the employment of individuals belonging to "civilized colored races," but they add that the "employment of savage tribes or barbarous races should not be resorted to in wars between civilized nations."

<sup>3</sup> Quoted by Spaight, p. 66.

<sup>4</sup> See his article in the *American Review of Reviews*, May, 1915, p. 564. "It is impossible," said Mr. Beveridge, "to imagine more villainous-looking creatures. Nearly all of them are small men, and most of them have viciousness stamped on every feature. Their evil eyes follow you expressionless, unblinking, like those of a serpent. Some of these men undoubtedly are criminals, — the forehead, jaw, mouth, back head, and above all the merciless, soulless eyes spell depravity. The Sikhs and Gurkhas from India, some of whom have fine and even noble features, are infinitely superior to this scum of Northern Africa; for such at least most of these particular Turcos must be. There are some faces among them that are not bad: but most of them justify the harshest description."

<sup>5</sup> General Smuts said of them: "I have never seen better behaved troops in my life. If you want a certificate of their character, go to the numerous German



Some German writers complained that among their enemies were to be found natives of India, Cossacks, and even Japanese.<sup>1</sup>

The evidence collected and published by the German government apparently leaves little doubt that in some instances atrocities were committed by African troops; but on the other hand, it does not indicate that these practices were sufficiently general or that the character of the regiments to which they belonged, as a whole, was such as to bring them within the category of "unlawful belligerents." Isolated atrocities of the kind of which the Germans complained are often committed by more highly civilized troops, and if the voluminous evidence in the British, Belgian, French, and Russian official reports may be relied upon, the troops of Germany themselves were not guiltless of numerous acts of equal cruelty and barbarity. Finally, it may be added that the Germans themselves were not guiltless of employing "colored" troops in their own operations, for among those fighting on the side of the Teutonic allies were Arabs, Hereros, Senussi, Tourega, Kabyles, Berbers, and others.<sup>2</sup>

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women and children scattered throughout that barbarous country and ask them what they think of the South Africans. They will tell you." Reuter Press despatch from Pretoria, *New York Times*, July 2, 1917.

<sup>1</sup> Cf. Dr. Dernburg, *Germany and the War*, p. 5, who remarks: "Now we find the English calling Japanese and Indians, the French calling the Senegalese and others, and the Russians calling the Cossack hordes to help them win from us thirty-five square miles, this being the whole of our Asiatic territory. . . . "It seems incredible to us that European nations should add to the horror of a European war by calling to their aid the Mongolian and Ethiopian, whose ideals are low or non-existent, who are really worse barbarians than we have been unjustly charged with having shown ourselves to be in Belgium."

The German Emperor was charged with giving orders that Cossacks should be treated as robbers when captured. The Russian government retaliated by an order directing that German aviators should be treated as pirates. Valentine Williams, correspondent of the London *Daily Mail*, in his book *With our Army in Flanders* (pp. 294, 299), says of the Indian troops: "They have proved themselves to be a smart and soldierly body of men, clean, well-mannered and, like all good troops, most punctual about saluting." Again: "They are fierce and terrible in their charge, but are merciful to their prisoners, and there is none of that slaying of prisoners that has eternally besmirched the German escutcheon."

<sup>2</sup> Concerning the British charges in respect to barbarities committed by black soldiers in the service of the German government in Africa cf. the British blue book entitled *German Atrocities and Breaches of the Rules of War*, presented to both houses of Parliament in July, 1916, Cd. 8306.

## CHAPTER XII

### *TREATMENT OF HOSTAGES AND EMPLOYMENT OF CIVILIANS AS SHIELDS AGAINST ATTACK*

§ 195. Hostage Taking in Belgium; § 196. Practice in France; § 197. Other Instances of Hostage Taking; § 198. Methods of Treatment; § 199. Former Practice in Respect to Taking of Hostages; § 200. Lawfulness of Taking Hostages for Securing the Obedience of the Inhabitants; § 201. What Punishment may be Inflicted on Hostages; § 202. Use of Captives as Screens of Protection against Attack by the Enemy; § 203. Instances in Belgium; § 204. Instances in France; § 205. Evaluation of the Evidence.

§ 195. **Hostage Taking in Belgium.** A practice resorted to by the Germans on an unprecedented scale during the recent war was the taking of hostages from among the inhabitants of the districts occupied by their forces. They were seized for a variety of purposes, the most common of which was to insure the obedience and good behavior of the civil population. In order to render the measure effective, the seizure was usually accompanied by a public threat to shoot all or a portion of those taken, in case acts of hostility were committed, and in a goodly number of cases the threats were carried out. The persons taken as hostages were generally the leading citizens of the community, including usually the mayor and sometimes other municipal officials, sometimes the schoolmaster, and frequently the parish priest or bishop. In some cases, especially in the smaller towns, however, a large part of the population was taken.<sup>1</sup> At Louvain the mayor, a senator, the rector and the vice-rector of the university, the vice-president of the court, and other prominent local officials as well as a number of ecclesiastics were among those seized. They were then led through the streets and compelled to warn the inhabitants that in case the German troops were fired upon by civilians, the hostages would be put to death.<sup>2</sup> Among the hostages taken at Louvain were

<sup>1</sup> Thus at Andenne, according to the Belgian commission of inquiry, all male inhabitants were taken as hostages. *Réponse au Livre Blanc Allemand*, p. 181.

<sup>2</sup> Fifth report of the Belgian commission of inquiry. These facts are admitted in the German white book, *The Belgian People's War* (Eng. trans., pp. 92, 100).

twenty Jesuit fathers, one of whom, Father Duperrieux, was shot for having in his pocket a diary in which he had compared the burning of the library of the University of Louvain to certain acts committed by the Huns.<sup>1</sup>

At Les Rivages, a suburb of Dinant, a large number of hostages, men, women, and children, were taken to insure the German troops against attack. According to the German white book they were placed alongside a garden wall, and while the German troops were engaged in building a pontoon bridge, the latter were fired upon by Belgian civilians from the neighboring houses, in consequence of which the male hostages were shot.<sup>2</sup> The Belgian government in August, 1915, issued a statement in which it denied the German charge that the troops were attacked by civilians and asserted that the shots alleged were fired by French soldiers. The German white book admits that the fire directed against the bridge builders came in part from French infantry and in part from civilians on the opposite side of the river.<sup>3</sup>

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The white book states that orders were given to inform the whole town, while ringing bells and beating drums, that every company entering the town would be preceded by a number of hostages, and that they would be put to death the minute new shots were fired from the houses, p. 118.

<sup>1</sup> Testimony of Professor Noël of the University of Louvain in Van der Essen's brochure *Statement about Louvain*, p. 4. Professor Noël states that the remaining Jesuit hostages were required to form a semi-circle around their condemned brother and to witness his execution. The details of the shooting of Father Duperrieux are set forth in Grondy's *The Germans in Belgium*, pp. 68-71. The aged bishops of Namur and Tournai were among the hostages taken in those towns. *Reports on the Violations of the Rights of Nations*, p. 100.

<sup>2</sup> Cf. pp. 65-68. Dr. Pretenz, a German staff surgeon, deposed before a German commission of inquiry that when he arrived at Dinant on the evening of August 23, 1914, he saw on the left of the bridge a heap of dead civilians whom, he was told, had been shot by the 101st Bavarian regiment, among them being several women and children. (As stated above, the German white book says only the male hostages were shot.) The dead, he adds, "were apparently hostages who had been taken out of the nearest houses and told that they must answer with their lives for the safety of the German troops." Cf. his deposition in the German edition of the white book referred to above (*Die Völkerrechtswidrige Führung des Belgischen Volkskrieges*, Anlage 51, pp. 190-191. Cf. also the deposition of lieutenant Baron von Rochow, *ibid.*, Anlage 47. The exact number of hostages shot at Dinant is not known. It is stated in the Belgian *Réponse* that the number was ninety (p. 220).

<sup>3</sup> *Ibid.*, Anlage 43. The Belgian version of the affair, in which the German defence is analyzed and refuted, may be found in an official publication of the Belgian government entitled *Réponse au Livre Blanc Allemand du 10 Mai 1915*, pp. 217-222, hereafter referred to as *Réponse*.

At Termonde 200 hostages are alleged to have been seized.<sup>1</sup> At Pepinister on August 21, 1914, a number of hostages were taken and informed that they would be shot unless a civilian who was alleged to have shot a German soldier was produced. They were subsequently released, however, after having convinced the German authorities that the shooting had occurred in another commune, whereupon the aged mayor of the latter commune was seized and shot.<sup>2</sup> At Wavre the members of the communal council and a priest were seized as hostages. At Ghent seven of the leading printers were taken to insure the surrender of certain persons who had violated the German regulations relative to the sale of newspapers.<sup>3</sup>

A German column which entered the village of Barinage was preceded by a detachment of cyclists, followed by about one hundred hostages. At Aerschot 200 hostages, constituting a large part of the male population, were taken, among them the mayor, who was required to address the inhabitants and warn them that if any persons were found with arms in their possession, they would be shot. Fifty of them are alleged to have been taken some distance from the town and executed, their comrades being required to dig their graves.<sup>4</sup> General von der Goltz in a proclamation of October 1, 1914, relative to the cutting of telegraph wires on the Lovenjoul-Vertryck line, announced that hostages had been taken from all the neighboring localities, and that they would be immediately shot in case similar offences were committed in the future.<sup>5</sup> Somewhat similar proclamations were posted at Forest on September 26, 1914,<sup>6</sup> and at Spa on August 17, 1914.<sup>7</sup> A proclamation containing the following

<sup>1</sup> Bryce, *Report on Alleged German Atrocities*, p. 12.

<sup>2</sup> London weekly *Times*, September 22, 1916.

<sup>3</sup> Bryce *Report*, p. 13; also Toynbee, *The German Terror in Belgium*, p. 39.

<sup>4</sup> Bryce *Report*, p. 22; also fifth report of the Belgian commission of inquiry. Toynbee, *op. cit.*, pp. 57 ff., gives the details.

<sup>5</sup> Text of the proclamation in Massart, *Belgians under the German Eagle*, p. 144.

<sup>6</sup> Text in Massart, *op. cit.*, p. 150. "I proclaim that these hostages will be immediately shot without previous judicial formalities," said the commander von Lessel, "if any attack occurs on the part of the population against our troops or the railway lines occupied by us."

<sup>7</sup> By commandant von Malzahun. "As fresh attempts at assassination have been made upon persons forming part of the German army, I have had persons from many localities arrested as hostages. These will guarantee with their lives that no inhabitant will again dare to commit a malevolent act against German soldiers or attempt to damage the railway, telegraph or telephone lines. Persons

passages is alleged to have been posted in several Belgian villages by Major Dieckmann of the German army:

"In order that the above-mentioned permit may not be abused, the burgomasters of Beyne-Heusay and Grivegnée must immediately prepare list of persons who will be held as hostages for 24 hours each at Fort Fléron from the 6th September 1914, at 6 P.M., to the 7th September at midday. The life of these hostages depends on the population of the above-mentioned communes remaining quiet in any circumstances. From the list which is submitted to me I will designate persons who shall be hostages from midday to the following midday. If the substitute is not there at the correct time, the hostage must remain another 24 hours at the fort. After these 24 hours the hostage will incur the penalty of death if the substitute has not presented himself. Priests, burgomasters and members of the administration are to be taken first as hostages."<sup>1</sup>

General von Bülow posted a proclamation at Namur on August 25, 1914, which contained the following threat:

"Every street will be occupied by a German guard who will take ten hostages from each street, whom they will keep under surveillance. If there is any rising in the street, the ten hostages will be shot."<sup>2</sup>

These are typical of a large number of such proclamations issued in Belgium.

§ 196. **The Practice in France.** At Sermaize-les-Bains about one hundred and fifty persons were seized as hostages and compelled to mount guard over a bridge, several of whom are alleged to have been subsequently shot.<sup>3</sup> On October 13, 1914, General Wahnschaffe took eighteen hostages at Lille to insure that the population should "remain tranquil." Among them were the bishop, the prefect, two deputies, the mayor and a number of members of the municipal council. They were required to present themselves at the city hall at ten o'clock everyday. A

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not belonging to the army surprised in committing such acts will be shot or hanged. The hostages of the surrounding localities will suffer the same fate. I shall then have the neighborhood burned to the last house. If the hostages attempt to escape, the locality to which they belong will be burned, and if captured the hostages will be hanged." Text in Massart, p. 151.

<sup>1</sup> Text in Davignon, *Belgium and Germany*, p. 3; Waxweiler, *Belgium Neutral and Loyal*, p. 296, and *Belgian Reports on Violations*, etc., p. 38.

<sup>2</sup> Text in Bryce *Report*, p. 271; in Davignon, p. 93; and in *Reports on Violations*, etc., p. 36 (6th Report).

<sup>3</sup> Report of the French official commission of inquiry, p. 9, and Saint Yves, *op. cit.*, p. 439. Hostages are alleged to have been taken similarly to protect a bridge over the Sambre from destruction by the French. Saint Yves, p. 465.

deposit of 5,000,000 francs as further security for the obedience of the inhabitants was required. By a proclamation of October 29 General von Heinrich fixed the number of hostages for Lille and the adjacent communes at sixty.<sup>1</sup> At Varedes in the department of the Seine-et-Marne eighteen hostages, including the curé, were seized, some of whom were beaten and otherwise maltreated, and at least three of whom are alleged to have been killed.<sup>2</sup> At Noyon on October 8, 1915, the German military commander issued a proclamation notifying the inhabitants that five designated citizens, including the mayor, would "answer with their lives" for the safety of the railways within the district.<sup>3</sup> At Combres, a village on the Meuse, a large number of hostages were seized, confined in a church, from which they were taken next morning and exposed to the fire of the French, again shut up in the church where they were kept for five days, after which they were marched off to the neighboring town of Herberville. Exhausted from hunger and the weariness of a long march, the men were put in cattle trucks and deported to Germany. The women and children were confined in a church for a month, where on account of inadequate sanitary facilities an epidemic of dysentery broke out.<sup>4</sup> On October 11, 1915, the mayors of Péronne and Flamicourt were taken as hostages and threatened with death in case of destruction of the railway.<sup>5</sup>

When the Germans were retreating northward after their defeat in the battle of the Marne in September, 1914, the military authorities posted a proclamation in the city of Rheims, containing the following threat:

<sup>1</sup> Text of the proclamation and names of the hostages, in Fage, *Lille sous la Griffe Allemande*, pp. 32, 40.

<sup>2</sup> Lavissee and Andler, *The German Theory and Practice of War*, p. 15; Toynbee, *The German Terror in France*, p. 34.

<sup>3</sup> Facsimile French text in the *New York Times* of July 22, 1917. Saint-Aymour in his book *Autour de Noyon* (p. 299) says that hostages were taken at Noyon at different times during the war. In February, 1917, thirty were taken, including the archbishop, all the members of the clergy, directors of various manufacturing establishments, several doctors and pharmacists, a justice of the peace, and an editor. Instances of brutal treatment of hostages are detailed on p. 88. Numerous cases of hostage taking in France are referred to in Calippe, *La Somme sous l'Occupation Allemande*. This author states that the curé of Ham, the mayor, and two adjoints, taken as hostages, were condemned to be shot, but were released upon payment of a ransom of 10,000 francs (p. 25). See also Fage, *op. cit.*, ch. III.

<sup>4</sup> Lavissee and Andler, p. 15.

<sup>5</sup> Text of the proclamation in Calippe, p. 99.



"In order adequately to assure the safety of the troops and to guarantee a calm attitude on the part of the population of Rheims, the persons named below have been taken as hostages by the German high command. These hostages will be hanged if the least attempt is made to create a disturbance, and if any infraction of what has been laid down is committed, the town will be wholly or partially burned and the inhabitants hanged. On the other hand if the town keeps absolutely peaceful and calm the hostages and inhabitants will be taken under the protection of the German army."

Then followed the names of eighty leading citizens, including five priests, and as if this were not enough, the list added "and others."<sup>1</sup> The mayor states that he and the other hostages were led out into the country, after which the work of destruction began.<sup>2</sup>

§ 197. **Other Instances of Hostage Taking.** At Lince, a small town in Belgium, sixteen hostages were shot during the first week in August, 1914;<sup>3</sup> at Namur ten were executed;<sup>4</sup> at Gelrode on August 19 twenty-one civilians were seized as hostages and imprisoned in the church. Later one in three was placed against the wall and shot; the others were marched off to Louvain and imprisoned in the church;<sup>5</sup> at Haecht five men were seized as hostages and shot;<sup>6</sup> at Marquégglise in France eight civilians, including the curé and the mayor, were carried away as hostages, and four others were shot.<sup>7</sup> At Montigny-sur-Sambre the Germans entered the town preceded by 300 hostages collected from the neighboring villages, three of whom were later shot.<sup>8</sup> At Deuxville the mayor and curé were taken as hostages and shot on August 25, 1914.<sup>9</sup> At St. Dié four hostages were placed on a chair in the street, one of them being

<sup>1</sup> Text in Bryce *Report*, p. 272, and in Wood, *Note Book of an Attaché*, p. 168. A facsimile of the proclamation, with the names of the hostages taken, may be found in Matot's *Almanach de la Guerre, Rheims et la Marne*, ed. 1916, p. 281.

<sup>2</sup> Massart (*op. cit.*, p. 327) prints the text of a proclamation issued at Andenne on August 31, 1914, in which the following passages occur: "All the men are held as hostages." "There will be at least two hostages shot for every shot fired at the German troops."

<sup>3</sup> Somville, *The Road to Liège*, p. 34.

<sup>4</sup> Van der Essen, *Petite Histoire de l'Invasion*, p. 36.

<sup>5</sup> Bryce *Report* (App.), deposition C, 39-45.

<sup>6</sup> *Ibid.*, pp. 100-108.

<sup>7</sup> Depositions nos. 430 and 431 in *Rapports et Procès-Verbaux d'Enquête*, etc. (issued by the French government), Vol. I, p. 206.

<sup>8</sup> Toynbee, *The German Terror in France*, p. 58.

<sup>9</sup> *Rapports et Procès-Verbaux*, Vol. I, depositions nos. 284-287.



killed and three others wounded by the fire of their own troops.<sup>1</sup> Lunéville was fined 650,000 francs, and a number of hostages, including the mayor, were taken as security for the payment of the sum demanded.<sup>2</sup> Later the mayor was required to issue a proclamation to the inhabitants warning them against making signals to French aeroplanes flying over the town and threatening that in case of infractions, hostages would be taken by the German commander. When the Germans entered Senlis in September, 1914, they took a large number of the townspeople, including the mayor, M. Odent, as hostages. Several who tried to evade seizure were shot. In consequence of shots having been fired at the Germans by certain inhabitants, the hostages were compelled to lie down in the mud, whereupon the general in command gave orders to shoot a number of them on the spot. At this juncture the mayor begged that the other hostages be spared and that he alone be punished. Thereupon the officer shot him with a revolver, after which six others were executed.<sup>3</sup>

§ 198. **Methods of Treatment.** It is clear that the German practice of taking hostages was very general. There is, indeed, reason to believe that it was resorted to in most of the towns and villages in Belgium and France which fell under their occupation. For the most part the purpose, as stated above, was to insure the good behavior of the inhabitants and strict obedience to the German authority. It was also resorted to for various other purposes, such as the insuring of compliance with demands for requisitions, the raising of contributions, the payment of community fines, to prevent acts of espionage, the destruction of railways, and the like.<sup>4</sup>

<sup>1</sup> *Ibid.*, Vol. V, depositions nos. 249-273.

<sup>2</sup> Text of the notice in Carillo, *Among the Ruins*, p. 299. Sarolea (*How Belgium Saved Europe*, p. 140) says hostages were also taken at Brussels to insure the payment of the first contribution levied upon the city. Massart (*op. cit.*, p. 150) speaks of 100 hostages having been demanded at Brussels, but says that the demand was subsequently withdrawn.

<sup>3</sup> Carillo (*op. cit.*, pp. 43 ff.) gives the details as they were related to him by an eye-witness. Cf. also the depositions of the *adjoint* and the secretary to the mayor, of M. Boulet, one of the hostages, and various other eye-witnesses in *Rapports et Procès-Verbaux*, etc., Vol. I, nos. 379-383.

<sup>4</sup> See Ferrand, *Des Réquisitions* (1917), p. 369. According to a press despatch from the Hague on February 1, 1918, ninety of the leading citizens of Ghent had recently been seized as hostages to guarantee the performance of military work by the inhabitants, which had been ordered by the Germans, *New York Times*, February 2, 1918.

The hostages seized were sometimes stationed on bridges to insure the latter against destruction; sometimes they were assembled on the public square; frequently they were marched in front of the German columns to protect the latter against attack, and the like. Considerable numbers were shot; everywhere they were threatened with execution in case of hostile acts by the inhabitants; occasionally they were subjected to the torture of sham executions; many were shut up in overcrowded buildings, churches, barns, and stables, deprived of food and drink, beaten and maltreated in other ways, as though they were criminals.<sup>1</sup> Large numbers were deported to Germany, where they were confined as prisoners or held to forced labor.<sup>2</sup>

§ 199. **Former Practice in Respect to Taking of Hostages.** The practice of taking hostages is an old one and in early times was resorted to as a means of insuring the execution of treaties, armistices, and other agreements. Except in the case of military conventions, however, it had rarely been resorted to for this purpose since the middle of the eighteenth century. It was introduced by Napoleon during his Italian campaigns as a means of insuring the allegiance of the inhabitants, but it appears that the only penalty with which they were threatened in case of misbehavior was deportation to France.<sup>3</sup> During the Franco-German war of 1870-1871 the Germans resorted to the practice on a somewhat extensive scale as a means of insuring their troops against attack by those whom they regarded as *francs-tireurs*, of insuring the obedience and good behavior of the civil population, and of compelling the payment of community fines and the raising of contributions.<sup>4</sup> It was during this war that

<sup>1</sup> The aged bishop of Tournai was confined as a hostage for five days "in a nauseous place, where he had only a mattress to lie on and no food except what certain devoted women brought to him." *Belgian Reports on Violations, etc.*, p. 68.

<sup>2</sup> Cf. 43 Clunet, 1139. A press despatch from Paris dated February 25, 1918 (*New York Times*, February 26), stated that "Thousands of hostages have been torn from their homes by German military authorities in the north of France and sent to Holzminden camp. They have been selected from among the notables and include educated and refined girls."

<sup>3</sup> Hall, *International Law*, 6th ed., p. 339. The early practice of taking hostages is fully discussed by Desjardins in his *Étude sur les Otages dans le Droit de Guerre*, ch. V.

<sup>4</sup> German practice in the war of 1870-1871 is detailed by Vassaux in his book *Prisonniers de Guerre*, pp. 99 ff. At St. Quentin the municipal council was required to deliver up two of its members as hostages. They were sent to Amiens and

the practice of "prophylactic reprisals" was first adopted by the Germans, that is, of placing prominent civilians on railway trains with a view to protecting them against derailment by the inhabitants of the occupied territory. This policy was carried to such lengths as to provide what amounted almost to a regular convoy service for trains operated by the Germans.<sup>1</sup> This device was also employed by the British for a brief period during the Boer war for the protection of railway trains and bridges.<sup>2</sup> The isolated instances of hostage taking in former wars, however, differed essentially from those with which the Germans were charged during the recent war. The latter were not content to place an occasional civilian on a bridge or in the centre of a street to prevent the inhabitants from doing acts which were regarded as illegitimate, such as the blowing up of bridges or firing by civilians upon the troops, but they went much further and systematically made use of civilians, including even women and children, to protect their troops from attack by the regular military forces of the enemy.

As to the legitimacy of the policy of placing civilians on railway trains to prevent their derailment there has been some difference of opinion. During the Boer war Mr. Bryce, speaking in the House of Commons, criticised the action of Lord Roberts and Earl Kitchener in compelling prominent Boer civilians to travel on trains to prevent their being wrecked by hostile inhabitants, as "contrary to the Hague convention and the general usages of civilized warfare." Mr. Broderick, secretary of state for war, however, defended the practice as legiti-

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confined in the citadel. At Châtillon-sur-Seine the curé, the mayor, the president of the court, the state's attorney, and other notables were taken. Pillet, *Les Lois Actuelles de la Guerre*, p. 213, adds that hostages were also taken by the Germans as an act of reprisal against the French for taking the crews of German merchant vessels as prisoners of war, forty notables being seized and interned for this reason at Bremen. Oppenheim remarks, however, that this was not properly a case of hostage taking, but an act of reprisal by the Germans. The American *Rules of Land Warfare* (art. 387) state that hostages have been taken in recent wars also to insure proper treatment of wounded and sick left behind in hostile localities and to protect the lives of prisoners of war and railroad officials who have fallen into the hands of irregular troops or whose lives have been threatened.

<sup>1</sup> Cf. Hall, p. 493; Spaight, pp. 466-467; Bordwell, p. 94, and Rolin Jaequemyns in *Rev. de Droit Int.*, Vol. II, p. 670.

<sup>2</sup> Such an order was issued by Lord Roberts on June 19, 1900, but it was withdrawn eight days afterwards. *British Manual of Military Law* (ed. of 1914), p. 306, note b. Cf. also Baty, *International Law in South Africa*, p. 88, and Spaight, pp. 125 and 467.

mate.<sup>1</sup> Writers on international law have generally condemned such measures. Pillet says the German proceedings of 1870-1871 "resembled that of mutineers who place women and children in the front rank, hoping that the troops will not fire on them." "Fighting," he adds, "ought to be confined to soldiers, and there is little military virtue in making use of non-combatants as a shield against the operations of the enemy."<sup>2</sup> Bonfils,<sup>3</sup> Calvo,<sup>4</sup> Rolin Jaequemyns,<sup>5</sup> Hall,<sup>6</sup> Westlake,<sup>7</sup> and the great majority of writers in fact adopt substantially the same view. "It would not be more unjust," says Westlake, "if civilians of the enemy State were placed in the front of battle in order to induce the enemy's troops to withhold their fire." The British *Manual of Military Law* condemns the practice, because it "exposes the lives of innocent inhabitants not only to the illegitimate acts of train wrecking by private enemy individuals but also to the lawful operations of raiding parties of the armed forces of the belligerent."<sup>8</sup> The German *Kriegsbrauch im Landkriege* defends the conduct of the Germans in 1870-1871, although it admits that "every writer outside Germany has stigmatized this measure as contrary to the law of nations and as unjustified to the inhabitants of the country." The Germans, it adds, recognized the measure as harsh and cruel, and it was resorted to only after repeated warning; it was further justified because it was the only method that was effective.<sup>9</sup>

Whether such a measure can be defended as a legitimate operation would seem to depend upon the status of the persons against whose acts it is directed. If the acts complained of are committed by the regular armed forces of the enemy, such a measure is illegitimate, because they have a right to destroy railways, bridges, and communications to prevent their use by

<sup>1</sup> Wyman's *Army Debates*, Ses. 1902, Vol. II, pp. 169 and 200, quoted by Spaight, p. 467.

<sup>2</sup> *Les Lois Actuelles de la Guerre*, p. 213.      <sup>3</sup> *Manuel*, § 1145.

<sup>4</sup> *Droit International*, § 2160.      <sup>5</sup> *Rev. de Droit Int.*, Vol. II, p. 388.

<sup>6</sup> *Op. cit.*, p. 470.

<sup>7</sup> *International Law*, Vol. II, p. 102. Geffcken, a German writer, condemned the action of the Germans in 1870 in placing French notables on railway trains to prevent their being wrecked, because it involved the punishment of innocent persons without securing any guarantee against fanaticism. Cf. his note No. 3 to Heffter's *Le Droit Int. de l'Europe*, p. 294. Bluntschli condemned it for the same reason. *Droit Int. Cod.*, § 600.

<sup>8</sup> P. 306.

<sup>9</sup> French translation by Carpentier, p. 110.

the enemy, and the latter may not lawfully expose the lives of innocent civilians to danger in order to prevent them from doing what they have a clear right to do. The case, however, is different if the acts against which such a measure is directed are committed by civilians. "The employment of hostages to prevent such acts is," as Spaight remarks, "closely connected with the resort to reprisals, and if reprisals against the civil population are legitimate, the use of hostages to prevent train wrecking by those who claim to be con-combatants would seem to be unobjectionable."<sup>1</sup> In so far as the Germans sought to justify this particular use of hostages during the recent war, it appears to have been based on this ground; that is, it was resorted to in order to prevent acts of hostility by the civil population and by those whom the Germans regarded as *francs-tireurs*. There is good reason to believe, however, that they made no careful distinction between acts of hostility committed by the armed forces and those committed by persons who were not lawful belligerents.

§ 200. **Lawfulness of Taking Hostages for Securing the Obedience of the Inhabitants.** Regarding the legitimacy of taking hostages and holding them as prisoners for the general purpose of securing the good behavior and obedience of the civil population there is also a difference of opinion among the authorities. The Hague regulations do not deal with the matter further than to declare that "the lives of private individuals must be respected" and that "belligerents are forbidden to compel the nationals of the adverse party to take part in the operations of war directed against the enemy." Napoleon defended the practice not only as a guarantee against attack, but as a means of depriving the enemy of its natural leaders.<sup>2</sup> Bluntschli classes it with reprisals and considers it to be excusable only when it is absolutely necessary,<sup>3</sup> and Westlake adopts substantially the same view.<sup>4</sup> Other writers condemn it on the ground that it involves the punishment of innocent

<sup>1</sup> Oppenheim likewise justifies the use of hostages in this manner, to prevent train wrecking by the civilian population. "The danger they are exposed to," he remarks, "comes from their fellow citizens, who are informed of the fact that hostages are on the engines and ought therefore to refrain from wrecking the trains." *International Law*, Vol. II, p. 272.

<sup>2</sup> Hall, *op. cit.*, p. 47c.      <sup>3</sup> *Droit Int. Cod.*, § 600, note 2.

<sup>4</sup> *Op. cit.*, Vol. II, p. 102.

individuals for acts for which they cannot properly be held responsible.<sup>1</sup>

§ 201. What Punishment may be Inflicted on Hostages. If we admit the right of a belligerent to take hostages for the purpose of insuring the good behavior and obedience of the civil population, we are at once confronted with the question as to what are the limits of his power over them. May he put them to death in case of the commission of acts to prevent which they have been seized?

Before the recent war there appears to have been no instances in which this extreme punishment was resorted to, although during the Franco-German war of 1870-1871 the Germans several times threatened to shoot hostages taken by them in case their orders were not complied with.<sup>2</sup> In early times the right to put hostages to death was asserted,<sup>3</sup> and it may sometimes have been exercised in practice; but modern writers are

<sup>1</sup> Cf. Taylor, *op. cit.*, p. 534. Bonfils (pp. 614-642) condemns it as being contrary to the enlightened usages, and Baty and Morgan (*War, Its Conduct and Legal Results*, pp. 185-186) stigmatize it as a relic of barbarism. The British *Manual of Military Law* (p. 306) lays down the view that it would be legitimate to take inhabitants as hostages in order to insure the proper treatment of wounded and sick left behind in hostile localities, of prisoners that have fallen into the hands of irregular troops, and of inhabitants who have risen in arms. The provisions of the American *Rules* (art. 307) are quoted above. The French *Manuel* (ch. III, art. 92), however, forbids the taking of hostages apparently for all purposes, and it declares that this rule should never be deviated from except in case of absolute necessity and upon the orders of the division commander, and if possible of the commander of the army. The manual of the laws of naval war adopted by the Institute of International Law at its session of 1913 forbids the taking of hostages for any purpose. *Annuaire*, 1913, pp. 310-311.

<sup>2</sup> In consequence of the killing of a Prussian officer by *francs-tireurs* at Ardennes in October, 1870, the Germans seized three French inhabitants of the commune and shot them without trial or without making any charge against them personally. Calvo, *op. cit.*, Vol. IV, § 2171. Although in principle the act did not differ from the shooting of innocent persons held as hostages, it does not appear that the victims were strictly speaking hostages, that is, they had not been previously seized and held as a guarantee against hostile acts. Merignhac, however (*Les Lois de la Guerre Cont.*, p. 33), seems to regard the persons thus shot as having been hostages. Vassaux in his *Prisonniers de Guerre* (p. 100) quotes an order of Colonel Ploetz issued at Châtillon-sur-Seine in November, 1870, which contained the following threat: "I will assure myself of a certain number of the most notable citizens of the city and surrounding villages and hold them as hostages. In case of an uprising I will shoot them as a punishment for the crime of their fellow citizens, according to the laws of war." At Beaune-la-Rolande a German general threatened to shoot a batch of hostages, but in consequence of their protestations of innocence he contented himself by charging them with a force of cavalry and cutting down a number with sabres (p. 104).

<sup>3</sup> Davis, *Elements of International Law*, p. 366.



practically all agreed that they are entitled to be treated as prisoners of war. They cannot, therefore, be put to death or subjected to other severities than those which may be lawfully inflicted upon regular military prisoners.<sup>1</sup>

Article 46 of the Hague convention of 1907 respecting the laws and customs of war on land declares that "the lives of private individuals must be respected"; article 4 of the same convention declares that prisoners must be humanely treated, and article 50 forbids collective penalties except for acts for which the community may be held responsible. Hostages are both "private persons" and "prisoners," and they are entitled to the respect and the humane treatment which the above-mentioned articles were intended to insure. But during the recent war the Germans were guilty of repeated and flagrant disregard of these humane and long established rules of civilized warfare. They were not content with imprisoning the persons seized by them as hostages but, as has been said, they subjected them in many cases to the most humiliating and degrading forms of punishment and even deported and shot them, contrary to all modern practice.

They frankly admitted that in certain cases they were guilty of hostage shooting, but attempted to justify their conduct on the principle that the mere taking of hostages would often prove ineffective in deterring the civil population from committing acts of hostility if a belligerent were not allowed to inflict extreme punishment upon hostages for violation of the orders for the observance of which they were taken.<sup>2</sup> As in

<sup>1</sup> This is the opinion of Bluntschli, §§ 426 and 600; of Hall, 6th ed., p. 412; the American *Rules of Land Warfare*, art. 387; the British *Manual*, art. 46<sup>1</sup>; the French *Manuel*, art. 8; Pillet, *Lois Actuelles*, pp. 212-213, and many others. Vattel (*Droit des Gens*, T. II, p. 239) says that in his time hostages were not even to be held in strict captivity, but being persons of rank and influence, they were treated rather as prisoners on parole.

<sup>2</sup> Cf. the following defence in the German white book, *The Belgian People's War* (pp. 67-68): "Likewise in agreement with the law was the shooting of the hostages which took place in various localities. The troops that were fighting in the town were in dire distress, since under the artillery, machine gun and rifle fire of the regular army of the enemy which was stationed on the left bank of the Meuse, they were shot at by the inhabitants both in their rear and on their sides. The hostages were secured in order to stop the action of the *francs-tireurs*. As nevertheless the people continued to inflict losses on the fighting troops, the shooting of the hostages had to be resorted to. Otherwise their seizure would only have meant a vain threat. The shooting of the hostages was all the more justified as their innocence was not likely, considering that the population in general took part in the fight."



so many other cases where they disregarded the laws of war, they invoked the plea of military necessity, which with them was practically the same thing as strategical interest or convenience. In many cases, as stated above, they seized hostages, and sometimes shot them, for acts committed not by civilians but by the armed forces of the enemy. Even if the shooting of hostages under certain circumstances were lawful, it could not be defended in such cases, because a belligerent has no right to put innocent civilians to death for perfectly lawful acts committed by the armed forces of their country.

The whole German policy in respect to the taking of hostages revealed Prussian militarism in its worst light. It was contrary to the most elementary notions of humanity and justice; it was based on an entire disregard of the well-established distinction between the rights of con-combatants and those of lawful belligerents and resulted in the punishment of innocent persons for acts for which they could in no way have been justly held responsible.

**§ 202. Use of Captives as Screens of Protection against Attack by the Enemy.** Still more reprehensible than the practice of taking hostages was the frequent use by the Germans of their captives, military and civil alike, as screens or shields to protect their columns against attack by the troops of the enemy or by the civil population of occupied territory. In many towns and villages occupied by the German forces large numbers of the inhabitants, including even women and children, were seized and placed in front of the German firing lines and sometimes were compelled to march for long distances at the head of columns of their troops to insure them against attack. The evidence in support of the charge is abundant and is of such a character as to leave little doubt that this practice was resorted to on many occasions, particularly in Belgium and France, and to a less degree on the Russian and Italian fronts and in Servia. The evidence may be found in the reports of the British, Belgian, and French official commissions, in numerous books and brochures, and in the letters and diaries of French soldiers and even of German soldiers themselves.

**§ 203. Instances in Belgium.** The tenth report of the Belgian commission of inquiry charges that from the moment of the arrival of the German army before Liège it sought to protect

itself against attack by thrusting groups of civilians in front of its lines.<sup>1</sup> This report contains the depositions of various witnesses who claim to have seen groups of civilians, including in some instances women and children, sometimes with their hands tied behind their backs or with ropes around their necks, being led in front of the German troops to serve as a shield of protection against the fire of French and Belgian troops. At Hainault a number of women and children are alleged to have been stationed on the bridge to prevent the French from bombarding it. The German troops entering Tournai on August 24, 1914, are alleged to have been protected by a body of civilians.<sup>2</sup> At Malines, the Germans are charged with having attempted to approach a canal, behind which lay Belgian troops, preceded by a body of civilians.<sup>3</sup>

The second report of the Belgian commission alleges that at Louvain bodies of civilians were forced to march in front of the German troops in order to protect them against the fire of the Belgians. The fifteenth report charges that on August 18, 1914, the Germans attacked the village of Hougaerde with two ecclesiastics in front of them, both of whom were killed; that a troop of German cavalry advanced to their positions at Kresyhem preceded by numerous civilians; that nine Uhlans entered Goyet with a number of inhabitants, including the mayor, in front of them; that near Jodoigne a detachment of Bavarian cyclists, with a curé in front, attacked a Belgian post, and that on August 25 a detachment of Uhlans marched through Marcinelle preceded by fifty or sixty civilians. Other similar occurrences took place in many towns.<sup>4</sup>

<sup>1</sup> *Reports on the Violations of the Rights of Nations in Belgium*, Vol. I, p. 69, being an English translation of *Rapports sur la Violation du Droit des Gens en Belgique*; *Publication Officielle du Gouvernement Belge*, Paris and Nancy, 1916, two volumes. Cf. also the *Report of the Bryce Commission on German Atrocities*, p. 53.

<sup>2</sup> Fifteenth Belgian report. The *Bryce Report* (p. 54) charges that at Tournai 400 Belgian civilians, men, women, and children, were placed in front of the German troops, who then proceeded to attack the French.

<sup>3</sup> *Reports on Violations, etc.*, p. 70. This method of approaching the Belgian defences is said to have been frequently resorted to by the Germans.

<sup>4</sup> Toynbee (*The German Terror in Belgium*) states that the Germans entered Hougaerde driving before them a curé, who was killed by the first bullet fired by the Belgian troops who were defending the road from behind a barricade (p. 56); that they marched in to Aerschot on August 19, 1914, driving before them two girls and four women with babies in their arms as a screen, one of the women

The report of the Bryce commission confirms in many instances the charges made by the Belgian commission and details numerous other instances in which civilians were used as screens.

§ 204. **Instances in France.** Both the British and French reports charge that the Germans resorted to similar expedients in France. Thus at Coutraçon, five men and a thirteen-year-old child are said to have been placed in front of a German detachment and exposed to the fire of the French troops during an engagement.<sup>1</sup> Near Néry in the department of the Oise the Germans are alleged to have seized and forced twenty-five civilians, men, women, and children, to march in front of their lines as a shield against attack by the British.<sup>2</sup> They entered Senlis on September 22, 1914, preceded by a body of civilians serving as a screen, precautions having been taken to seize for the purpose every inhabitant met on the road.<sup>3</sup> A German diarist admits that at Monceau several hundred civilians were driven in front of the German columns while they were crossing a bridge on the Sambre.<sup>4</sup> On August 22, 1914, they entered Jumet, driving thirty civilians in front of their columns.<sup>5</sup> At Marcinelle on August 25 a party of Uhlans was seen driving fifty or sixty inhabitants before them.<sup>6</sup> At Combres on the morning of September 22 the whole population was dragged out of their beds at 2 o'clock and herded on a hillside as a screen for the Bavarians against the fire of the French.<sup>7</sup> At various

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being wounded by the fire of the Belgian troops (p. 57); that they collected about four hundred men, women, and children at Campenhout, Elewyt, and Malines and drove them forward as a screen, with the priest of Campenhout at their head, against the Belgian forces holding the outer ring of Antwerp (p. 76), and that during their retreat from Hofstade they compelled about two hundred of the inhabitants to follow them as a screen to cover their flank against attack by the Belgians (p. 180).

<sup>1</sup> Report of the French commission of inquiry, p. 6. The charges against the Germans in respect to this practice are detailed in the several volumes of an official French publication entitled *Rapports et Procès-Verbaux d'Enquête de la Commission Instituée en Vue de Constater les Actes Commis par l'Ennemi en Violation du Droit des Gens*. Cf. especially Vol. I, pp. 11, 37, 57, 184, 185; Vol. II, pp. 11, 67, and Vols. III-IV, pp. 7-9.

<sup>2</sup> *Ibid.*, Vol. I, p. 184.

<sup>3</sup> *Ibid.*, p. 185. Cf. also Carillo, *Among the Ruins*, p. 46.

<sup>4</sup> Toynbee, *The German Terror in France*, p. 51. Cf. also St. Yves, *op. cit.*, p. 465, and the *Belgian Reply to the German White Book*, p. 131.

<sup>5</sup> Toynbee, *op. cit.*, p. 53.

<sup>6</sup> *Ibid.*, p. 56.

<sup>7</sup> *Ibid.*, p. 149. C. Ward Price, correspondent of the London *Daily Mail*, vouches for the truth of this charge.

other places in France civilians were alleged to have been used as screens, notably at Steinbach, Saint-Dié, Nimy, Biez, Marchienne, and Nazareth.

§ 205. **Evaluation of the Evidence.** Regarding the charges against the German commanders for resorting to this barbarous practice, it may be safely assumed that, as in the case of other atrocity charges, there was the usual exaggeration; but the instances in which such acts were charged were so numerous and spread over so wide an area, and the evidence is so voluminous, that it is impossible to believe that the charges in many instances were without foundation. It may also be added that evidence from unimpeachable German sources is by no means lacking, for among the diaries and letters of German soldiers which fell into the hands of the French authorities facsimiles of which were photographically reproduced by Professor Bedier of the Collège de France, there are not a few which contain admissions by their authors that civilians were compelled by the Germans to march in front of their columns during the preceding engagements.<sup>1</sup>

<sup>1</sup> Cf. Bedier, *How Germany Seeks to Justify Her Atrocities*. Cf. especially the diaries on pp. 27-32, and notably that of Lieutenant Eberlin, a Bavarian officer, who says the Germans compelled four civilians at Saint-Dié to occupy chairs in the middle of the street during the fight, and who further records that on the same day another German regiment, which entered the town by another road, had recourse to a similar expedient. The four civilians who had been compelled to sit in the street, he says, were killed by French bullets. "I saw them myself," he says, "stretched out in the middle of the street near the hospital." Cf. also Allier, *Les Allemands à Saint-Dié*, p. 93. The *Norddeutsche Zeitung*, referring to this incident, contended that the act was justifiable if the engagement was with *francs-tireurs*. Bedier quoted, however, from Lieutenant Eberlin's diary to show that the fight was not with *francs-tireurs* but with "red trousers" and Alpine chasseurs, i.e., with French and Belgian troops. Cf. also various diaries in Bland, pp. 325-327, and in Dampierre, *Carnets de Route de Combattants Allemands*.

## CHAPTER XIII

### *DEVASTATION OF ENEMY TERRITORY*

§ 206. Devastation in France in 1917; § 207. Testimony of Ambassadors Sharp and Penfield; § 208. The German Defence; § 209. The Law in Respect to Devastation; § 210. Conclusion; § 211. Further Devastation and Looting in 1918; § 212. Protest and Demand for Retaliation; § 213. The German Defence.

§ 206. Devastation in France in 1917. An act of the Germans which aroused strong indignation throughout the civilized world and which was denounced as one of the crowning barbarities of the war was the devastation of the Somme region of France before its evacuation by the German armies in March, 1917. The territory evacuated was, according to German accounts themselves, converted into a veritable waste and left an "empire of death."<sup>1</sup> There were some two hundred and forty towns, villages, and hamlets within the devastated area. According to an associated press despatch of June 11, 1917, "one hundred of these small communities were heaps of stones and bricks without one habitable room or cellar among them, while of the remainder, one-third were partly demolished," and within this region thirty-five thousand old men, women, and children were left without food or shelter by the Germans.<sup>2</sup> Not only were the roads, culverts, bridges, and other objects of

<sup>1</sup> The military correspondent of the Berlin *Lokal Anzeiger* in its issue of March 18, 1917, thus described the act: "In the course of these last months, great stretches of French territory have been turned by us into a dead country. It varies in width from ten to twelve or fifteen kilometres, and extends along the whole of our new position, presenting a terrible barrier of desolation to any enemy hardy enough to advance against our new lines. No village or farm was left standing on this glacis, no road was left passable, no railway-track or embankment was left in being. Where once were woods there are gaunt rows of stumps; the wells have been blown up, wires, cables and pipe-lines destroyed. In front of our new positions runs, like a gigantic ribbon, an empire of death." Cf. also a German diary which describes in detail the German policy of systematic destruction in the *Lokal Anzeiger* of March 27, 1917, quoted in the booklet *Frightfulness in Retreat*, pp. 21-24.

<sup>2</sup> New York Times, June 27, 1917.

military value destroyed, but hundreds of private houses were burned; fences were demolished; shade trees which lined the country road sides were levelled; orchards and vineyards were uprooted; dwelling houses were pillaged and their furniture carried away; mirrors, pictures, and crockery were smashed; portraits, books, manuscripts, and relics were defiled, slashed with knives, or smeared with filth; and wells and springs were filled with manure or otherwise polluted.<sup>1</sup> Banks were said to have been robbed; churches desecrated and despoiled of their bells, vestments, and relics; and tombs were even broken open and the bones of the dead scattered. Wythe Williams, a newspaper correspondent who travelled over the devastated region after its evacuation by the Germans, thus described it:

"Every farm is burned, fields destroyed, every garden and every bush uprooted, every tree sawed off close to the bottom. It was a terrible sight and seemed almost worse than the destruction of men. Those thousands of trees prone upon the earth, their branches waving in the wind, seemed undergoing death agonies before our eyes. Everything gave its share to the blood lust of hate. Churches gave their organs for their copper, also the brass rails of their altars, even crucifixes upon ruined walls were stripped down and torn asunder."<sup>2</sup>

Another correspondent of the *New York Times*, writing of the destruction of Bapaume, said:

"The systematic way in which Bapaume was destroyed was only equalled by the thoroughness with which it was looted. Everything worth transportation had been carried away. The painted stations of the cross in the church had been cut out of their stone frames. I examined them closely and the evidences of this were incontrovertible. The mural frescoes, of course, could not be removed, but all of them with one exception had suffered the fate of the shattered walls. This one exception was a representation of the Redeemer on the cross — another of the many instances of the kind that have been remarked in the path of this war."<sup>3</sup>

From most of the towns all men of military age were carried away, and from some of them large numbers of women and

<sup>1</sup> Cf. *London Times* of March 19, 1917, and the *Temps* of March 27, 1917. A German order which fell into the hands of the French directed that all unused wells and watering ponds at Bancourt should be "plentifully polluted with dung and creosote soda," and that sufficient dung and creosote soda should be placed in readiness beside the wells still in use." Facsimile of the order in the brochure entitled *Frightfulness in Retreat*, p. 62.

<sup>2</sup> *New York Times*, March 28, 1917.

<sup>3</sup> *Ibid.*, April 15, 1917.

girls were deported to Germany for compulsory labor.<sup>1</sup> In some instances, as in the case of Ham and Chauny, the inhabitants were assembled and those between the ages of sixteen and twenty summarily expelled. Those who were left behind found themselves in a wretched condition, their houses having been destroyed or pillaged and the country despoiled of its food supplies and stripped of its live stock and poultry. In some cases, it was alleged, no food at all was left for their subsistence; in other cases not more than five days' rations were left. Even the supplies collected by the relief commission, it is charged, were appropriated by the Germans. When the French troops arrived, they found hundreds of the inhabitants locked up in houses or barns; all were in a state of destitution; some were too weak to stand on their feet; on all sides their rescuers found human wrecks.

§ 207. **Testimony of Ambassadors Sharp and Penfield.** The details regarding the ruin wrought by the Germans may be found in the official report of the French commission appointed to investigate acts committed by the enemy in violation of international law<sup>2</sup> and in the letters of newspaper correspondents who

<sup>1</sup> From Nesle 423 women and girls, practically all of those above 15 years of age, were alleged to have been carried away (*London Times*, March 20, 1917). From Rouy-le-Grand over 400 women and children were deported for forced labor in Germany; and from Noyon 50 girls between the ages of 15 and 25 were carried off "to act as officers' servants." (*London Times*, March 23.)

<sup>2</sup> Its report on the devastation of the Somme region may be found in the *Journal Officiel* of April 18, May 30, and June 30, 1917, and in the *Temps* of April 18. The French government on March 24 instructed its diplomatic representatives in neutral countries to denounce the "unqualifiable acts" of the German authorities. "No motive demanded by military necessities," it said, "can justify the systematic devastation of public monuments, artistic and historical, as well as public property, accompanied by violence against persons. Cities and villages in their entirety have been pillaged, burned, and destroyed; private homes stripped of all furniture, which the enemy has carried off; fruit trees have been torn up or rendered useless for future production; streams and wells have been poisoned. The inhabitants, relatively few in number, who have not been removed have been left with a minimum of rations while the enemy seized stocks supplied by the neutral revictualling commission which were destined for the civil population. You will point out that this concerns not acts destined to hinder the operations of our armies, but of devastation having no connection with this object and having for its purpose the ruin for years to come of one of the most fertile regions of France. The civilized world can only revolt against this conduct on the part of a nation which wanted to impose its culture on it, but which reveals itself once again as quite close to barbarism still, and in a rage of disappointed ambition tramples on the most sacred rights of humanity." Text in Fauchille, *L'Evacuation des Territoires Occupés par l'Allemagne dans le Nord de la France*, p. 23. This booklet contains a full account by a distinguished French jurist of the devastation wrought by the Germans.



visited the stricken regions after the retreat of the Germans.<sup>1</sup> The charges against the Germans were also confirmed by the testimony of high officials of neutral nationality, among others the American ambassadors to France and Austria-Hungary. Ambassador Sharp, who visited the devastated region shortly after the retirement of the Germans, made a report (dated April 1, 1917) to the department of state in which he declared that "never before in the history of the world had there been such a thorough destruction wrought by either a vanquished or victorious army. A scene of desolation reigns everywhere over the reconquered territory. This is true not alone where the possibly excusable military operations carried out by the Germans protected their retreat by the blowing up of all the bridges and the destruction of the means of telegraphic and telephonic connections, including portions of railway lines and the blocking of highways by the felling of many trees, but also where as far as the eye could see nearly all the fruit trees had either been cut down or exploded so as to completely ruin them. Not only were the towns destroyed for no seeming military reason, but every private house along the country highways, including some of the most beautiful châteaux of great value, had been completely gutted by explosives or by fires systematically planned. I am told that before the retreat commenced the agricultural implements found on the farms were also destroyed. The churches and cathedrals in some of the towns had been reduced to a mass of ruins by the Germans either by heavy charges of explosives or by fires."<sup>2</sup>

Mr. Penfield, American ambassador at Vienna, also visited the devastated region and declared that the reports of German barbarity and frightfulness were not exaggerated.

"We visited," he says, "Noyon, Péronne, Ham, Coucy, Chauny — in fact practically every town between the British front on the west and Verdun on the east. Scores of towns and villages, isolated châteaux and factories were razed to the ground. The entire Aisne Department seemed

<sup>1</sup> Cf. especially the despatches of the London *Times* and the New York *Times* (of March 21, 28, and April 15, 19, 1917); an article by J. P. Collins in the Boston *Transcript* of August 8, 1917; the brochure *Frightfulness in Retreat* (Hodder and Stoughton, 1917); a French pamphlet by B. Vallotton entitled *Au Pays de la Mort* (Attinger Frères, 1917); M. Fauchille's brochure referred to in the preceding note, and a book by the abbé Calippe entitled, *La Somme sous l'Occupation Allemande* (Paris, 1918), where many of the details are given.

<sup>2</sup> His report was printed in the New York *Times* of April 7, 1917; also in *German War Practices* (ed. by Munro, Sellery, and Krey), published by the United States Committee on Public Information, pp. 51 ff. In a second report, dated April 16, Ambassador Sharp declared that "every article of furniture in the houses was either destroyed or carried away by the Germans," and he added that "the work was carried out methodically, during weeks and months, in order not to arouse the suspicion of the enemy."

destroyed beyond repair. The Germans appeared to have an antipathy to Catholic churches, for battering had reduced all to shapeless piles of débris. The destruction everywhere was complete, outrageous, fiendish. During the day we saw no living thing, native to the land, no cow, sheep, or horse; no dog, cat, or fowl. We visited many stately châteaux that had been destroyed beyond man's ability to repair. At one place we found the private chapel of a historic family of France whose coffins had been opened by vandals searching for plunder. Everywhere French soldiers told us that it had been only five weeks earlier when the rout of the Germans had become so urgent that they hastened through villages plundering and burning as they went — but not until all art objects and furniture of value had been despatched beyond the Rhine. The most ruthless and revolting thing that a visitor to the evacuated area perceives is the total destruction of all trees, fruit-bearing and ornamental. Nearly every tree in the Aisne Department has been felled, and for what purpose? There can be but one — to cripple the restoration of Northern France to usefulness. Men and money can rebuild the homes and factories in a year or two, but to restore the orchards and other useful trees will call for a half century. What the Germans did to tree life in Northern France was the systematic murdering of Nature, nothing less." "From every town and village," he added, "men and women had been driven into Germany like animals by the infuriated and beaten Teutons."<sup>1</sup>

§ 208. **The German Defence.** In the main, the Germans admitted the truth of the charges made against them respecting the devastation of the Somme region, but as in the case of their other violations of the laws of war they defended it as a measure of military necessity. "It was necessary to carry out a military plan to meet the big offensive the Entente had planned," was the explanation emanating from one German source. The minister of war, von Stein, in an interview with an Argentine journalist, denied that there had been any violation of the Hague conven-

<sup>1</sup> Text in *German War Practices*, pp. 53-54; also *New York Times*, May 18, 1917. Cf. also the observations of Herbert Hoover in the *National Geographic Magazine*, May, 1917, p. 441, and of Hugh Gibson, *A Journal from our Legation in Belgium*, pp. 298-299. Russian Poland appears to have been similarly devastated by the Germans. Cf. a report of F. C. Walcott in *German War Practices*, pp. 89-90, and an article by the same author on *Devastated Poland* in the *National Geographic Magazine* for May, 1917. He says: "In the great Hindenburg drive one year ago (1916) the country was completely devastated by the retreating Russian army and the oncoming Germans. A million people were driven from their homes. Half of them perished by the roadside. For miles and miles, when I saw the country, the way was littered with mudsoaked garments and bones picked clean by the crows — though the larger bones had been gathered by the thrifty Germans to be ground into fertilizer." The Bulgarian armies during their retreat from Macedonia are alleged to have devastated the country in a manner which even surpassed in its thoroughness that of the Germans in France.

tion. The territory evacuated, he said, constituted a *terrain* of operations, and it was necessary that the commanding general should create a *glacis* behind his new position and make a desert in front of his adversaries. As to the levelling of orchards, that was necessary to prevent enemy troops from concealing themselves beneath their foliage and thus sheltering themselves from the view of German aviators.<sup>1</sup> As to the deportation of the inhabitants and particularly of young girls, that too was a justifiable measure. "Today," he went on to say, "it is not armies alone who face each other, but peoples. One cannot leave among his enemies laborers to carry on agriculture and make munitions of war. We have not deported young girls alone but all the population capable of working. For the same reason we have taken all metals, zinc, iron, copper, etc., which had served the war industry of the enemy." As to the taking away of objects of value and securities, that had been done in the interest of the population. In the cities like Péronne, bombarded by the French and English, the Germans had collected valuables of all kinds and turned them over to the authorities.<sup>2</sup>

§ 209. **The Law in Respect to Devastation.** It is of course permissible to destroy war material, railways, telegraphs, barracks, factories, and army supplies generally, also private property situated in the anticipated field of battle or in the zone of actual fighting whenever such property may be utilized by the enemy for military purposes as for shelter or defence; likewise houses, fences, and trees may be demolished to clear a field for attack; but the general devastation of a whole region is not

<sup>1</sup> There was, of course, no foliage in March when the devastation took place.

<sup>2</sup> Quoted in Clunet, 1917, p. 1351; cf. also the *Temps* of March 23 and 24 and May 18, 1917. Cf. also a defence by the military correspondent of the *Frankfurter Zeitung* (issue of March 20, 1917), who says: "Our command wished to create a vast zone with a view to future battles; consequently a large zone of devastation has been made, which might aptly be called the war zone, inasmuch as no mercy was shown." The *North German Gazette* declared that "the destruction wrought by the Germans in the evacuated region has been dictated by a hard but inflexible military necessity." A Munich journal stated "that this destruction is fully justified, because the life of a German soldier is more precious than everything else. Only sentimental souls who reverence relics of museums will deplore these destructions." The *Vorwaerts* justified the destruction of the historic château de Coucy on the ground that its walls were several metres thick and would therefore have afforded an ideal cover for the troops and machine guns of the enemy. Quoted by Fauchille, *op. cit.*, p. 44. The views of other German journals are reproduced in the *Temps* of March 29 and 30, 1917.

permissible at all or only in case of self-preservation, a contingency which is scarcely imaginable.<sup>1</sup>

It is quite evident that the German devastation of the Somme region went much further than military necessity warranted, including as it did the cutting down of orchards and vineyards which lay outside the probable line of battle, the burning of farms, the destruction of historic monuments, the destruction or carrying away of farm implements, the looting and pillaging of private houses, the pollution of the wells, the deportation of young girls, and other acts which had little or no connection with military defence. It is one thing for a retreating army to destroy objects which directly might serve the military purposes of the pursuing belligerent; it is a very different thing to desolate indiscriminately a great area of country before evacuating it, to deport a large part of the population and reduce the rest to starvation. There is little doubt that much of the destruction was malicious and wanton and was done in the spirit of revenge.<sup>2</sup>

Devastation beyond what is a direct and immediate necessity of war is forbidden by the Hague convention respecting the laws and customs of war,<sup>3</sup> by the long-established customary rules of civilized warfare, by the opinions of text writers, and by the war manuals of most countries. "General devastation of enemy territory," says the British manual, "is as a rule absolutely pro-

<sup>1</sup> Cf. Oppenheim, *International Law*, Vol. II, § 154; Hall (6th ed.), pp. 529-532; Spaight, *War Rights on Land*, p. 112; Hershey, *Essentials*, pp. 393-394; Lawrence, *Principles*, § 207; Moore, *Digest*, Vol. VII, § 1123; Pradier-Fodéré, §§ 2770-2774; Taylor, *Pub. Int. Law*, §§ 481-482; Calvo, *Droit Int.*, Vol. 4, §§ 2215 ff.; Holland, *Laws of War on Land*, pp. 13-14, 43-44, and Wheaton, §§ 347-351.

<sup>2</sup> Several articles published in the *Berliner Tageblatt* (March 22, 1917) and the *Lokal Anzeiger* (March 27) leave no doubt that the elements of intimidation and frightfulness were by no means lacking. Several German diaries which fell into the hands of the enemy contain evidence that some of the German soldiers carried out the work of destruction with reluctance and only because they were ordered to do so. The Dutch paper *Les Nouvelles* of April 13, 1917, printed a diary of this kind. Cf. also the testimony of Wythe Williams, correspondent of the *New York Times*, in its issue of March 28, 1917. Fauchille (*op. cit.*, p. 48) relates that when M. Noël, the mayor of Noyon, denounced the conduct of the Germans to a commission of German officers, one of them replied: "It is not solely against the French army that we make war, but also against the civil population, against France entire, against the women and children. Nothing that can be done with a view to impoverishing you — to ruin you if possible — can be a subject of reproach against our army."

<sup>3</sup> Art. 23 g.

hibited, and only permitted very exceptionally, when it is imperatively demanded by the necessities of war.”<sup>1</sup> “The measure of permissible devastation,” says the American *Rules of Land Warfare*, “is found in the strict necessities of war. As an end in itself, as a separate measure of war, devastation is not sanctioned by the law of war. There must be some reasonably close connection between the destruction of property and the overcoming of the enemy’s army.”<sup>2</sup> “Only the necessities for the conduct of operations,” says the French manual, “may excuse destruction of private property.”<sup>3</sup>

§ 210. Conclusion. There appears to be no precedent in modern wars for a measure so cruel and frightful as that of the Germans described above.<sup>4</sup> When General Lee invaded Pennsylvania during the Civil war he did not molest the civil population. There was no burning of houses or farms, no levelling of orchards or cutting of trees, no pillage or looting, no seizure and deportation of civilians to the Confederacy. The devastations committed by Generals Sherman and Sheridan during the same war have often been denounced for their severity, but even they went to no such lengths; they were characterized by no such wantonness and cruelty, and as military measures they have been defended by many writers on international law.<sup>5</sup> Even the policy of devastation in South Africa during the Boer war, barbarous as it has seemed to some, was far less inhumane than the German policy of terrorism and frightfulness in the Somme region, and according to some writers it was amply justified by the peculiar nature of the war.<sup>6</sup> Such measures in the end are of very doubtful expediency, because the possible military value is likely to be more than offset by the spirit of revenge and hatred which they arouse in the enemy.<sup>7</sup>

<sup>1</sup> Art. 434.    <sup>2</sup> Art. 334.    <sup>3</sup> Art. 101.

<sup>4</sup> The French senator, Chéron, describing to the Senate his visit to the devastated region, said: “We must go back to the remotest ages in history in order to discover any acts of such barbarity and destruction which might resemble, and then only to a slight degree, those we have seen perpetrated by our enemies in the evacuated region. We visited several towns and about fifty villages. Everywhere plundering and systematic destruction have been the order of the day; acts of sheer barbarity have been committed for no military reasons whatever.”

<sup>5</sup> E.g., by Bordwell, *Law of War*, pp. 77-79, and by Spaight, *op. cit.*, pp. 133-136.

<sup>6</sup> Spaight, p. 136. Cf. also Oppenheim, *op. cit.*, Vol. II, p. 154.

<sup>7</sup> M. Viviani, speaking in the French parliament on March 31, 1917, of the German policy of devastation, declared “that we shall fight on until victory is gained, for it is on it alone that chastisement depends. We shall obtain reparation by the military force of France and her Allies.”

§ 211. **Further Devastation and Looting in 1918.** The almost universal condemnation of the German armies for the devastation of the Somme region in the spring of 1917 appears to have made no impression upon the German military authorities, and in the autumn of 1918, when the German forces were being driven out of France and Belgium, they again resorted to a policy of systematic destruction, looting, and deportation. A considerable number of villages, towns, and cities were burned before their evacuation by the occupying troops, among them Cambrai, Lens, and Noyon. Many others were systematically sacked and looted; private houses were stripped of everything of value, including food, wine, copper, cooking utensils, furniture, and art treasures; in many cases, it is alleged, furniture, statues, works of art, and other things which could not be carried away because of the rapid advance of the allied armies were smashed or defiled; factories were despoiled of their machinery, or it was destroyed;<sup>1</sup> historic town halls, churches, and other buildings were blown up by bombs, and in many cases the civil population was ordered to leave before the arrival of the allied armies.<sup>2</sup> Without food and without shelter they wandered about the country in a starving condition, thousands of them escaping into Holland. Many charges were also made that the German authorities compelled the inhabitants to perform work of a military character, sometimes within the zone of artillery fire. The city of Lens is said to have been almost completely destroyed, some 10,000 houses having been razed and the population of 35,000 inhabitants driven out.<sup>3</sup> At a sitting of the chamber of

<sup>1</sup> A correspondent of the *Paris Journal* states that German manufacturers visited the Briey valley region and selected the machinery which they desired for their own plants. This was immediately shipped to Germany. The rest was systematically and effectually destroyed under the direction of a specially organized corps of fifteen officers and one hundred men. *New York Times*, Nov. 29, 1918.

<sup>2</sup> Many details of the systematic devastation of France are given in an article by the correspondent of the *London Morning Post* (reproduced in the *New York Times Current History Magazine*, March, 1919, pp. 504 ff.); cf. also an article by Geo. B. Ford of the American Red Cross, *ibid.*, pp. 516 ff.

<sup>3</sup> Cf. an article entitled "The Devastation of Northern France" by Germain Martin in the *Atlantic Monthly* for April, 1919, pp. 561 ff. Everything, the author says, was "carefully, systematically and methodically destroyed"; private houses, factories, printing presses, coal mines, etc.; woods and forests were "indiscriminately cut down and millions of acres of land were devastated, a large part of which was rendered unfit for cultivation." Herbert Hoover in a despatch to



deputies on December 19, 1918, it was asserted that 250,000 houses had been destroyed in the devastated region and as many more injured. The extensive coal mines were ruined by flooding and rendered impossible of use for probably two years.<sup>1</sup> Of the entire population of Roulers (some 25,000) only about 100 persons were found there when the allied armies entered. Douai was described as a waste and a desolation when the rescuing armies entered it. The civil population appears to have been removed by the Germans in order that the houses might be available for the billeting of the soldiers. The city hall was stripped of its candelabra, the archives were scattered in the streets, the stained glass windows in the church of St. Peter were smashed, the great organ was broken to pieces, and the religious ornaments were scattered on the floor. Saint-Quentin suffered almost as much. Early in the war the cathedral had been ruined; before evacuating the city in 1918 the Germans looted it of machinery, furniture, and art treasures; the windows of the fifteenth-century town hall were destroyed, the roof had collapsed, and the floor was covered with rubbish.<sup>2</sup> Château-Thierry likewise

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the chairman of the commission for relief in Belgium in January, 1919, stated that "the entire industrial life of the region has been destroyed; there is scarcely a single factory that can be operated without a very large portion of new equipment." Frank H. Probert, consulting engineer of the United States bureau of mines, in a report made April 1, 1919 (*New York Times*, April 22, 1919), said: "In my opinion no such atrocity was ever perpetrated against the industrial life of any country. Magnificent steel plants, comparing favorably with anything we have in the United States, are now but a tangled, twisted mass of structural steel and broken stone. The wilful demolition was scientifically planned and systematically carried out. The maliciousness and efficiency with which this crime against French industry was carried out is almost unbelievable."

<sup>1</sup> The methods by which the coal mines were destroyed and the extent of the havoc wrought by the Germans are described by Germain Martin in the article in the *Atlantic Monthly* referred to above and by Mr. Probert in the report cited. "The coal veins of Northern France," the latter says, "are overlain by water-bearing strata, necessitating special methods of shaft sinking and support to keep the mines dry. The steel lining of the shafts was dynamited, letting in the quick-sands and flooding the underground workings for miles around. In the entire Pas de Calais region it is estimated that 120,000,000 cubic metres of water must be pumped before mining operations are resumed. Having flooded the mines, the head frames and surface equipment were systematically dynamited, the twisted débris in many cases filling up the demolished shafts."

As compensation for the destruction of the coal mines Germany was required by the treaty of peace to cede to France the coal mines situated in the Saar basin.

<sup>2</sup> Cf. the account of an eye-witness, G. H. Perris, in the *New York Times* of October 5, 1918.



was looted and partially destroyed,<sup>1</sup> and so were Cambrai, Roubaix, Turcoing, Laon, Noyon, Tournai, Lille, Roye, Coutrai, Valenciennes, and other towns.<sup>2</sup> A newspaper correspondent described Cambria after its evacuation by the Germans as a "smoking ruin." "The Germans," he added, "have probably never perpetrated a more ruthless nor more premeditated act of vandalism than this destruction of Cambrai."<sup>3</sup> Before evacuating the towns they took care to plant mines in many of the houses, presumably with a view to destroying enemy troops who might subsequently occupy them.

§ 212. **Protest and Demand for Retaliation.** The conduct of the German armies aroused intense indignation in the countries at war with Germany, and it was of course strongly condemned by public opinion in neutral countries. In the former countries there was considerable demand that the allied governments should serve notice on the German government that in case its policy of devastation and looting were not immediately discontinued, measures of reprisal would be carried out in the form of destruction of German cities, vineyards, etc., on the Rhine, and it was reported in the press despatches in October, 1918, that such a proposal was under consideration by the allied governments.<sup>4</sup> Bombardment reprisals against German cities, it was pointed out, had caused the Germans to discontinue to a large extent their air raids upon undefended towns, and it was

<sup>1</sup> A despatch to the *New York Times* (July 30, 1918) thus describes the vandalism that had been wrought by the Germans before they evacuated the place: "Today there is nothing that has not been destroyed. The tapestries have been hacked to pieces, the pictures slit from corner to corner, the leather and other chair coverings have been ripped from their frames and all the delicate *marqueterie* and the irreplaceable examples of craftsmanship of past centuries have been smashed. The legs have been torn off the tables and used in further work of destruction. There is not a mirror which has not been broken, and the glass and china flung at them lie in fragments before them. The costly carpets have been soiled in every possible way and inkpots flung at the silken papers on the walls. This vengeful fury has been carried even to the extent of smashing nurseries and doll houses. The fashion in which beds and rooms have been defiled is difficult of description."

<sup>2</sup> Philip Gibbs, correspondent of the *New York Times*, thus described the pillaging of Valenciennes: "Requisitioning included all copper, mattresses, wool and wine, and less than a month ago German soldiers completed the sack of the city by going round to each shop and filling sacks with Valenciennes lace — one sack held 50,000 francs worth of lace — linen handkerchiefs and clothes. This was official robbery. Private looting by soldiers was severely punished and two soldiers were shot for it." *Times*, November 5, 1918.

<sup>3</sup> *New York Times*, October 10, 1918.

<sup>4</sup> *New York Times*, October 3, 1918.

urged that the threat of retaliation in kind against their policy of devastation would be equally effective. The reluctance of the allied governments, however, to resort to a measure of this kind was so strong that the proposal does not appear to have been favorably received. A more moderate proposal, that the German government be informed that it would be held responsible and that suitable reparation would be exacted at the conclusion of the war, found more favor.<sup>1</sup> M. Pichon, French minister of foreign affairs, urged this policy in the Senate, which unanimously adopted a resolution proposed by the government for the appointment of a commission to ascertain the amount of damages committed by the Germans in violation of the laws of war and to "proceed actively in coöperation with the other allies with plans to obtain reparation for such damages." The secretary of state of the United States on November 7 made public a communication which he had caused to be sent to the German government through the Swiss legation in which he protested against the reported intention of the German military authorities in Belgium to destroy the coal mines before evacuating the regions in which they were situated. He called the attention of the German government to its note of October 20 to the allied governments in which it declared that "the German troops are under the strictest instructions to spare private property and to exercise care for the population to the best of their ability." Referring to the report that had reached the American government of the intention of the retreating German armies to destroy the coal mines in Belgium, he added:

"Acts so wanton and malicious, involving as they do the destruction of a vital necessity to the civilian population of Belgium and the consequent suffering and loss of human life which will follow, cannot fail to impress the government and the people of the United States as wilfully cruel and inhuman. If these acts, in flagrant violation of the declaration of October 20, are perpetrated, it will confirm the belief that the solemn assurances of the German government are not given in good faith."<sup>2</sup>

<sup>1</sup> By the treaty of peace Germany agreed not only to make compensation for all damage done to the civilian population of the allied and associated powers and to their property, but to accept responsibility for herself and her allies for causing all the loss and damage to which the former powers and their nationals had been subjected as a consequence of the war. The amount of the damage is to be determined by a reparations commission and to be notified to the German government on or before May 1, 1921. Compensation may be claimed from Germany for damages on account of nine different categories of acts. Arts. 231-244.

<sup>2</sup> Text in *Official Bulletin*, November 8, 1918, p. 1.

§ 213. **The German Excuse.** As to the acts referred to above, it is not to be assumed of course that they were all forbidden either by the Hague convention or the customary laws of civilized warfare. As has already been pointed out, a retreating army is within its rights when it destroys objects which are capable of serving directly the military purposes of the pursuing adversary and it can hardly be doubted that some of the destruction wrought by the Germans could be justified under the laws of war as they have generally been understood and applied. This was frankly admitted by the allied military commanders. The German government in a note of October 20, 1918, to the allied governments respecting terms for an armistice protested "against the reproach of illegal and inhumane actions made against the German land and sea forces and thereby against the German people."

"For the covering of a retreat," it added, "destructions will always be necessary, and they are carried out in so far as is permitted by international law. The German troops are under most strict instructions to spare private property and to exercise care for the population to the best of their ability. Where transgressions occur in spite of these instructions, the guilty are being punished."<sup>1</sup>

What was said above, however, in regard to the German devastations of 1917 may be said equally of those of 1918, namely, that they went far beyond what may be justified under

<sup>1</sup> Text in *New York Times*, October 22, 1918. The German secretary of state for foreign affairs, Dr. Solf, in an interview sent out by the Wolff news bureau, is reported to have thus denied the charges against the German troops: "The particularly malicious campaign of incitement with which a part of the enemy news service has accompanied the present crisis of the war, is the continually rejected accusation that in our retreat we have purposely and systematically devastated occupied French territory. It is untrue that our troops slaughter wounded, intentionally blow up hospitals and schools, rob churches and commit other crimes against enemy prisoners and populations. The work of destruction which in our retreat, as in every operation of retirement in history, was unavoidable, has everywhere been restricted to measures of really indispensable harshness which are intended to prevent a retiring army from leaving in the hands of the enemy bases which to a great extent are of a military character." Dr. Solf asserted that the allies had frequently bombarded French towns on the plea of military necessity and exposed the civil population to great danger and suffering. If such measures by the enemy were justifiable on military grounds, why was the German destruction not equally justifiable? This argument, however, is specious. A belligerent cannot be reproached by his adversary for bombarding his own cities with a view to driving out the enemy. The inhabitants of the French cities thus bombarded in fact welcomed it as a means for their own delivery.

any reasonable interpretation of the law of military necessity. The destruction of vineyards, the levelling of orchards and shade trees, the sacking and burning of towns and villages, the turning of the civil population out to starve, the destruction of churches, town halls, and historic monuments, the wholesale policy of deliberate and systematic looting and pillaging, the conversion of whole regions into a waste and a desolation were not only contrary to the laws of humanity and the more enlightened practices of the past, but it subserved little if any military purpose. Much of it was sheer vandalism and appears to have been done in the spirit of wantonness and revenge. It was, however, entirely in accord with the doctrines of the German militarists that war is a contest not merely against the armed forces but against the civil population as well, that violence, ruthlessness, and terrorism are legitimate measures, and that whatever tends to shorten the duration of the war is permissible.<sup>1</sup>

<sup>1</sup> Charges were also made against the Germans that they adopted a similar policy of devastation and spoliation before evacuating the regions of Russia occupied by them. Everything of value, it was alleged, which could be removed, including horses, cattle, household furniture, telegraphic and telephonic instruments, machinery, railway material, etc., was carried off by the retreating armies. *New York Times*, October 31, 1918. Somewhat similar though less serious charges were made by the Italian government against the retreating Austrian armies.

## CHAPTER XIV

### *SUBMARINE MINES AND MARITIME WAR ZONES*

§ 214. Early Charges against the Germans in Respect to Mine Laying. § 215. Counter-Measures of the British Government; § 216. The German War Zone Decree of February 4, 1915; § 217. The British and German measures Compared; § 218. The German "Barred" Zone Decree of January, 1917; § 219. Character of the German Measure; § 220. Neutral Protests against Mine Laying; § 221. Provisions of the Hague Convention in Respect to Mines; § 222. The British War Zone of November, 1914; § 223. The American Protest against the German Decree of February 4, 1915; § 224. The American Proposal of February 20, 1915; § 225. Replies to the American Note; § 226. The Dutch Protest; § 227. Legality of Maritime War Zones.

§ 214. Early Charges against the Germans. The British government charged the Germans with having planted mines in the open waters of the North Sea on the very first day of the war, the German cruiser *Königin Luise* being sunk by the British naval forces while engaged in laying them. Several vessels flying neutral flags were also caught while engaged in the same service.<sup>1</sup> On August 6 the British cruiser *Amplion* was sunk

<sup>1</sup> In consequence of evidence that fishing trawlers, "possibly disguised as neutral vessels," were engaged in laying mines for Germany, the Dutch government was notified by the British government on Sept. 28, 1914 that it was obliged to take "exceptional measures in order to meet the situation." Accordingly all ports on the east coast of England were closed to neutral fishing vessels after October 1, and "special measures of control" over the waters of the North Sea contiguous to the English coast were adopted. Neutral fishing vessels found in a certain designated zone would be treated as under suspicion of being engaged in mine laying for Germany and, if caught in the act, would be sunk. In case of resistance the crews would be treated as war criminals and shot after trial by court martial.

In a note dated October 7, 1914, the Dutch minister of foreign affairs protested that the British measure constituted an encroachment upon the right of neutral fishermen to exercise in a peaceable manner their trade in the open seas. Furthermore, the proposed method of procedure in dealing with suspected offenders was "extremely dangerous both from the point of view of humanity and the law of nations since guilt was to be assumed rather than proven." To this remonstrance the British minister at the Hague replied on November 4 that it was not the intention of the British government to treat the suspicion as confirmed in the absence of additional proof, and that no crews would be treated as war criminals except after trial and conviction. The correspondence between the two govern-

at sea by a mine, and merchant vessels of various neutral nationalities suffered a similar fate during the ensuing weeks. The Dutch government also complained that in the spring of 1915 its fishing vessels encountered numerous mines in the open waters of the North Sea, which, it was charged, had been planted by the Germans. Several of them ran into the mines and were sunk. During a single week the Dutch coast guards picked up from twelve to twenty mines per day that had broken from their moorings and drifted upon the shore of The Netherlands or were found floating about in the territorial waters of the country, thus making navigation in their own waters extremely hazardous.<sup>1</sup> The Germans were also charged with laying mines in neutral waters, particularly those of Sweden, in consequence of which the Swedish steamer *Knippla* was sunk in March, 1915.<sup>2</sup>

Owing to the German practice of sowing mines in the North Sea the British admiralty from time to time warned neutrals of the danger to which they would be exposed in traversing those waters. In a warning issued on August 23, 1914, the admiralty stated that

"The Germans are continuing their practice of scattering mines indiscriminately upon the ordinary trade routes. These mines do not

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ments may be found in a Dutch white paper entitled *Diplomatieke Bescheiden Betreffende de Vaart in de Noordzee, etc.* (The Hague, 1915), pp. 3-5.

<sup>1</sup> Cf. the protest of the Dutch government of September 18, 1915, in the Dutch orange book, *Oversicht der Voornaamste van July, 1914, tot, October, 1915, etc.*, pp. 17-18. Pechédécki (*Le Droit Int. Maritime et la Grande Guerre*, p. 21) says the total number of vessels, belligerent and neutral, destroyed by German mines during the first two months of the war exceeded twenty.

<sup>2</sup> A despatch from Stockholm on March 1, 1915, stated that "Germany has now taken her long-expected action in laying a mine field around the Falsterbo peninsula, near the southern extremity of Sweden on the Baltic, scarcely three miles off shore. As the passage left is very shallow, nowhere deeper than fifteen feet, most merchant ships are obliged to steam outside the mine fields into international waters where German cruisers are on patrol. The new mine field is intended to prevent traffic in contraband along the Swedish coast to Finnish points, but as the steamers used in this traffic draw but little water, seldom over ten feet, the mine field has not affected them. All larger ships, however, will be put under German surveillance, and not even Sweden's navy will be able to sail from the North Sea to the Baltic nor the reverse without German pilots." This policy caused great indignation in Sweden, and the Swedish government lodged an energetic protest with the German government, which agreed to abandon this procedure in case Sweden would undertake to prohibit English contraband trade with Russia. This, however, the Swedish government declined to do on the ground that it would involve partiality toward the Central powers and would therefore be an unneutral act.

become harmless after a certain number of hours; they are not laid in connection with any definite military scheme, such as the closing of a military port, or as a distinct operation against an invading fleet, but appear to be scattered on the chance of touching individual British war or merchant vessels. In consequence of this policy, neutral ships, no matter what their destination, are exposed to the greatest danger. The admiralty, while reserving to themselves the utmost liberty of retaliatory action against this new form of warfare, announce that they have not so far laid any mines during the present war and that they are endeavoring to keep the sea routes open for peaceful commerce."

The London *Times* protested against this "callous and inhuman mode of warfare, if it can be called warfare to place engines of destruction in places where they are more likely to do harm to peaceful trading ships than to the fighting vessels of a belligerent." In addition to the neutral vessels destroyed, several British ships suffered a like fate. One of these was the *Runo* of the Wilson line, which struck two "floating mines," it was alleged, twenty-five miles off the coast of England. It had on board some three hundred passengers bound from New York to Archangel.<sup>1</sup> On September 10 the Earl of Camperdowne in the House of Lords interpellated the government in regard to the steps the admiralty were taking "to counteract the inhuman and diabolical German practice of sowing mines broadcast on the commercial routes at sea." "Such mine laying," he added, "is not war, but a barbarous attempt at indiscriminate murder which could in no way affect the issue of war. The shipping of small neutral States such as Norway, Denmark, and Sweden suffered most, as they had not the power to make effective complaint."

§ 215. Counter-measures of the British Government. On October 2 the British government, which until then had refrained from planting mines in the open seas, announced that in consequence of the "German policy of mine laying, combined with

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<sup>1</sup> In February, 1915, the steamers *Carib* and *Evelyn* were sunk by mines in the open sea off the German and Dutch coasts. The German admiralty stated that if the destruction was the result of German mines, the masters of the vessels were to blame for failure to follow the directions prescribed by the admiralty. Secretary of State Lansing, in a letter dated April 5, 1917, addressed to United States Senator King, referring to the claim made by certain pro-German propagandists that these vessels were sunk by British mines, said: "It may be stated that in contemporaneous German communications the sinking of the vessels is apparently assumed to have been caused by German mines." Text in *Cong. Record*, April 6, 1917, pp. 265-266.



their submarine activity," it was necessary on military grounds for the admiralty to adopt counter-measures, and that His Majesty's government had therefore authorized "a mine-laying policy in certain areas and a system of mine fields had been established and is being developed upon a considerable scale."<sup>1</sup> Notice was accordingly given that it would be dangerous for ships to pass through the area between the parallels of  $51^{\circ} 15'$  and  $51^{\circ} 40'$  north latitude and the meridians of  $1^{\circ} 35'$  and  $3^{\circ} 00'$  east longitude.<sup>2</sup>

On November 3 the British admiralty issued a statement charging the Germans with having also "scattered mines indiscriminately in the open sea on the main trade route from America to Liverpool via the north of Ireland," and charging also that they had been laid by some merchant vessel flying a neutral flag. Mine laying under a neutral flag and reconnoissances conducted by trawlers, hospital ships, or neutral vessels were, it was alleged, the ordinary features of German naval warfare.<sup>3</sup> Peaceful merchant ships, it was said, had already

<sup>1</sup> During the course of the debates in the Senate in April, 1917, on the war resolution the charge was made by Senator La Follette that Great Britain had first planted mines in the North Sea. Secretary of State Lansing, being appealed to by Senator King for an opinion as to the truth of this charge, addressed a letter to Mr. King in which he stated that the first mining of the high seas was done and officially announced by the German admiralty on August 7, 1914, nearly two months before the British government acted. The German announcement of August 7 was communicated to all the neutral governments. The charge referred to, therefore, was without foundation. The text of Mr. Lansing's letter may be found in the *Cong. Record* of April 6, 1917, pp. 265-266.

<sup>2</sup> In September several Italian fishing boats were reported as having been destroyed by floating mines placed in the Adriatic Sea by the Austrians. The Italian government addressed a protest to the government of Austria against the alleged violation of the Hague convention in respect to the laying of mines. But the Italian government appears to have likewise planted extensive mine fields in the Adriatic for the protection of Italian commerce but open routes were designated through which neutral vessels trading with Italian ports were directed to navigate.

<sup>3</sup> The *Nord Deutsche Zeitung* denied the British charges regarding the laying of mines in the high seas and also the charge that Germany had employed fishing boats or vessels flying neutral flags for laying them anywhere. All mines laid, it asserted, had been placed as near to the English harbor entrances as the coast lines and character of the bottom permitted. Moreover, they had been carefully anchored, and neutral powers had been duly notified. If any mines had broken loose from their moorings, the number was much less than that of British mines, some of which had been driven upon the Belgian and Dutch coasts. In May, 1915, Count von Bernstorff, German ambassador at Washington, presented a memorandum to the state department in which he affirmed that the German

been blown up by German mines, the great liner *Olympic* having escaped disaster by "pure good luck," and, but for warnings given by British cruisers, other British and neutral vessels would have been destroyed. Notice of the following order was therefore made public:

"Owing to the discovery of mines in the North Sea, the whole of that sea must be considered a military area. Within this area merchant shipping of all kinds, traders of all countries, fishing craft, and all other vessels will be exposed to the gravest dangers from mines which it has been necessary to lay and from war-ships searching vigilantly by night and day for suspicious craft.

"All merchant and fishing vessels of every description are hereby warned of the dangers they encounter by entering this area except in strict accordance with Admiralty directions. Every effort will be made to convey this warning to neutral countries and to vessels on the sea, but from the 5th of November onwards the Admiralty announce that all ships passing a line drawn from the northern point of the Hebrides through the Faroe Islands to Iceland do so at their own peril.

"Ships of all countries wishing to trade to and from Norway, the Baltic, Denmark, and Holland are advised to come, if inwards bound, by the English Channel and Straits of Dover. There they will be given sailing directions which will pass them safely, so far as Great Britain is concerned, up the east coast of England to Farne Island, whence safe route will, if possible, be given to Lindesnaes Lightship. From this point they should turn north or south, according to their destination, keeping as near the coast as possible. The converse applies to vessels outward bound.

"By strict adherence to these routes the commerce of all countries will be able to reach its destination in safety, so far as Great Britain is concerned, but any straying, even for a few miles, from the course thus indicated may be followed by serious consequences."

This measure, it was added, had been made necessary by the action of Germany and "out of regard to the great interests entrusted to the British navy, to the safety of peaceful commerce on the high seas and to the maintenance within the limits of international law of trade between neutral countries." It was an "exceptional measure, appropriate to the novel conditions under which this war is being carried on." In May, 1916, the British mine fields in the straits of Dover were extended so as to include the waters south of latitude  $51^{\circ} 40'$  and north as far

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mines were of a type which became harmless when they broke loose from their moorings. Burgess (*America's Relations to the War*, pp. 7 ff.) characterizes the British charge against the Germans as "an entirely unsupported assertion," but the long list of British and neutral vessels which were destroyed by mines leaves no doubt that they were laid by direction of the German admiralty.

as the meridian of  $3^{\circ} 20'$  east. As thus extended, they were brought much nearer the Dutch coast, thus making it impossible for vessels to pass around that coast along the southeastern corner of the field. The purpose of the extension, according to the press despatches, was to prevent German submarines from being sent down the Scheldt from Antwerp. Several weeks later all previous notices regarding navigation in the North Sea were revoked, and three new mine fields were established on the east coast of England, provision being made for the movement of ships around either the northern or southern extremities of the British Isles. In January, 1917, the "dangerous area" of the North Sea was greatly extended by an order of the British admiralty. The new area began about twenty miles east of Flamborough Head on the British coast and spread out in a fan-shaped form eastward toward Jutland on the Danish coast and to a point opposite the coast of Holland. It enclosed a vast area of the North Sea between England and Germany except the marginal waters of Denmark and Holland. It was not stated in the admiralty notice how the area was to be made dangerous, but it was inferred that mines would be freely employed. The purpose as unofficially announced was to bar the entrance of the German naval forces into the straits of Dover and the English Channel, to prevent German sea raiders from attacking the English coast, to intercept the voyages of the *Deutschland* and other German commercial submarines, and to enable the British fleet to deal effectively with the German high sea fleet should it come into the North Sea. By a proclamation of February 13, 1917, the danger zone was further altered by cutting off the western half, leaving an irregularly shaped zone off the Danish and German coasts with a safety lane between the British and German danger areas and also widening the safety zone along the Dutch and Danish coasts. Another alteration was made in March by extending slightly the area of the danger zone to the westward, and finally in July the zone was extended to embrace all waters (with the exception of Dutch and Danish territorial waters) lying south and east of a line running from a point three miles off the coast of Jutland along latitude  $57^{\circ} 8'$  north.

§ 216. The German War Zone Decree of February 4, 1915. In the meantime the German government had by way of retalia-

tion proclaimed a great area of the sea to be a war zone. In a memorandum of February 4, 1915, respecting retaliatory measures rendered necessary by various methods adopted by Great Britain contrary to international law to intercept neutral trade with Germany for the purpose of reducing the German people to starvation, among others the treating of the whole North Sea as a military area and thereby practically establishing a blockade of neutral ports and coasts, the German government announced that it must now consider whether it could any longer observe the rules of the Declaration of London in case Great Britain persisted in her unlawful measures, especially if neutral powers continued to look with indulgence upon these violations of neutrality.

"The time has come for Germany," the memorandum added, "also to invoke such vital interests. It therefore finds itself under the necessity, to its regret, of taking military measures against England in retaliation for the practice [followed by England. Just as England declared the whole North Sea between Scotland and Norway to be comprised within the seat of war, so does Germany now declare the waters surrounding Great Britain and Ireland, including the whole English Channel, to be comprised within the seat of war, and will prevent by all the military means at its disposal all navigation by the enemy in those waters.<sup>1</sup> To this end it will endeavor to destroy, after February 18 next, any merchant vessels of the enemy which present themselves at the seat of war above indicated, although it may not always be possible to avert the dangers which may menace persons and merchandise. Neutral powers are accordingly forewarned not to continue to intrust their crews, passengers, or merchandise to such vessels. Their attention is furthermore called to the fact that it is of urgency to recommend to their own vessels to steer clear of these waters. It is true that the German navy has received instructions to abstain from all violence against neutral vessels recognizable as such; but in view of the hazards of war, and of the misuse of the neutral flag ordered by the British government, it will not always be possible to prevent a neutral vessel from becoming the victim of an attack intended to be directed against a vessel of the enemy."

**§ 217. The British and German Measures Compared.** A comparison of the British "danger area" with the German

<sup>1</sup> The route of navigation around the north of the Shetland Islands, in the eastern part of the North Sea, and a strip thirty miles wide along the Dutch coast were not included in the danger zone. Later in the same month, however, it was announced that the zone had been extended to include the waters surrounding the Shetland Islands and the Orkney Islands, including the harbor of Kirkwall. Passages on both sides of the Faroe Islands were not embraced within the war zone.

"war zone" reveals several differences. In the first place, the German war zone embraced all the seas around the British Isles, including the whole of the British Channel, whereas the dangerous area notified by the British admiralty embraced only the North Sea. In the second place, the British order contained no announcement of an intention to destroy under any circumstances enemy merchant vessels navigating the danger area thus proclaimed; its purpose was to protect the English coast against attack by the naval forces of Germany by making approach through the adjacent waters dangerous or impossible. Contrary to the German decree, it left certain routes open and undertook to guarantee neutral vessels against destruction by English mines by furnishing their masters with sailing directions which, if followed, would insure their safety. In fact, it does not appear that any neutral vessel was ever destroyed or injured by a British mine while navigating the dangerous area. Apart, therefore, from the delays and inconveniences to which neutrals were subjected in the exercise of their right to navigate the high seas, the British measure was unobjectionable. The German war zone involved a much more serious encroachment upon neutral rights, and in so far as it involved the sinking of merchant vessels without provision for the safety of their crews and passengers, it was a violation of the conventional law of nations and even of the German prize code itself (articles 116, 129). It is one thing for a belligerent to plant submarine mines in a portion of the open seas for the sole purpose of preventing the approach of the warships of the enemy to his coasts when effective measures are taken to protect neutral vessels against destruction by the mines thus planted; it is a very different thing for a belligerent to undertake to destroy all merchant vessels of the enemy traversing a certain area of the seas, without providing for the safety of the crews and passengers and without taking measures to prevent the destruction of neutral vessels navigating those waters by providing them with sailing directions and by aiding them to make their way safely through the dangerous area.

§ 218. The German "Barred" Zone Decree of January, 1917. Indefensible as was the German war zone decree of February 4, 1915, it was far less unlawful than the measure proclaimed in January, 1917, following the repudiation of three

successive pledges made to the government of the United States regarding the sinking of merchant vessels in the war zone established by the earlier decree.<sup>1</sup> The newly proclaimed war zone embraced the whole of the North Sea including the waters around the British Isles, extending north to the Faroe Islands, westward from France and England for about five hundred miles, and southward to within a few miles of the coast of Spain. A large portion of the Mediterranean Sea was also included within the "barred" area. The aggregate area of the open seas embraced within the forbidden zones was estimated to exceed one million square miles. Within these zones, beginning on February 1, "all sea traffic was to be forthwith opposed by means of mines and submarines." A narrow lane extending from Falmouth westward through the barred zone into the Atlantic was left open, and so was a similar safety passage through the Mediterranean.<sup>2</sup> Through the first lane of safety American passenger vessels, and only those, were allowed to sail subject to the condition that they should make Falmouth their port of destination; that they should be painted with vertical stripes three metres broad, alternating with red and white, on the sides of their hulls; that they should carry from their mast a large flag of checkered red and white and the national flag at the stern, and that they should be highly illuminated at night. Even this concession was to be limited to one steamer per week which must arrive at Falmouth on Sundays and depart on Wednesdays. Moreover, guarantees must be given by the American government that the steamers availing of this privilege were not carrying contraband, as defined by the German government. All neutral merchant vessels entering the barred zones in violation of the above-mentioned conditions would be destroyed without

<sup>1</sup> In March, 1917, the German barred zone was extended to include a portion of the Arctic Ocean lying east of 240 east longitude and south of 75° north latitude, thus barring entrance to the waters through which access to northern Russian ports was reached. In November it was extended to include the waters around the Azores which, it was explained, had "become in economic and military respects important hostile bases of Atlantic navigation." The decree also closed the safety lane through the Mediterranean Sea to Greece, this on the ground, as alleged, that it was being utilized by the Venizelos government for the transportation of arms and munitions. Finally, on January 5, 1918, the zone was extended to include a large area around the Cape Verde Islands and the waters between the Madeira and Azores Islands as well as the waters around them. Text of the decree in the *Official Bulletin* of the United States, January 30, 1918.

<sup>2</sup> As stated in the preceding note, this lane was closed in November, 1917.



warning and of course without provision being made for the safety of their crews and passengers. This measure was avowedly adopted in retaliation against Great Britain for "using her naval power in a criminal attempt to force Germany to submission by starvation, in contempt of international law." Great Britain, it was said, had in defiance of international law attempted to destroy the legitimate trade of her opponents and by ruthless pressure compelled neutral nations either to forego their rights of trade or to limit it to such as she might arbitrarily permit. In a note of January 31, delivered by Count Bernstorff to the secretary of state of the United States, the assertion was made that the freedom of the seas as a preliminary condition of the free existence of nations had always formed a leading part of Germany's political program. "The American government was aware of the efforts which had been taken to cause England and her allies to return to the rules of international law and to respect the freedom of the seas. In spite of this the English government insisted upon continuing its 'war of starvation,' which does not affect at all the military power of its opponents, but compels women, the sick and the aged, to suffer for their country pains and privations which endanger the vitality of the nation." On the following day (January 31) a second memorandum was handed to the secretary of state by Count Bernstorff, in which it was further sought to justify the action of the German government on the ground that the Entente powers had "bluntly refused" Germany's peace offer and were determined to continue the war in order "to deprive Germany of her provinces in the East and West, to destroy Austria-Hungary and to annihilate Turkey." The government of the United States, it was added, would no doubt understand the situation thus forced upon Germany by the Entente allies' brutal methods of war and by their determination to destroy the Central powers. Furthermore, the government of the United States would realize that the now openly disclosed intention of the Entente allies "gives back to Germany the freedom of the seas which she reserved in her note addressed to the government of the United States on May 4, 1916." Finally, it was added, the measure would result in "a speedy termination of the war and in the restoration of peace which the government of the United States has so much at heart."



§ 219. **Character of the German Measure.** Aside from the violation of specific pledges given by the German government to the American government that its submarines would in the future refrain from sinking merchant vessels without warning and without making provision for the safety of the crews and passengers, the assertion of the German government of a right to close by proclamation a vast area of the high seas to neutral navigation and to destroy neutral vessels traversing these waters in case they did not comply with the most humiliating conditions in respect to the position of their flags, their ports of destination, their time of arrival, departure, and the like, was so obviously contrary to the most elementary rules of international law, immemorial usage, and the principles of humanity that it would be a waste of time to enter into a discussion of the subject. In any case, even if it be admitted that the conduct of the Entente allies was contrary to the rules of international law, it afforded no justification for retaliatory measures the effect of which was to exclude neutrals, under penalty of destruction of their ships, from navigating vast areas of the high seas. It is hardly necessary to say that the right of reprisal against an enemy does not carry with it the right to destroy deliberately the ships of unoffending neutrals while peacefully navigating the high seas. The proclamation of the German war zone was frequently referred to as a blockade,<sup>1</sup> and some German apologists in the United States even asserted that there was very little difference between the British blockade of Germany and the so-called German blockade of the British Isles.<sup>2</sup> But this contention was manifestly based on a false conception of what constitutes a blockade.<sup>3</sup>

§ 220. **Neutral Protests against Mine Laying.** Against the planting of mines in the open seas neutral governments, and

<sup>1</sup> Cf., e.g., the communication of the Swiss minister at Washington, Dr. Paul Ritter, of July 12, 1917, transmitting a statement from the German government of its willingness to negotiate with the United States regarding modifications of German submarine policy provided the *commercial blockade* against England be not interfered with.

<sup>2</sup> Cf., for example, a communication by Professor Preserved Smith in the *Nation* of March 1, 1917.

<sup>3</sup> Perrinjaquet characterizes it as not only a "paper blockade" but an attempt to exclude neutrals from navigating the high seas under penalty of destruction of their ships. See his article *La Guerre Commerciale Sous-Marine* in 24 *Rev. Gén. de Droit Int. Pub.*, especially p. 372.

particularly that of The Netherlands, vigorously protested. In a *note verbale* dated September 18, 1915, addressed to the Imperial German government, the Dutch government complained that during the preceding months of May and June numerous Dutch trawlers engaged in fishing in the North Sea had encountered submarine mines, and that a number, indeed, had been destroyed by running into them. German automatic contact mines had been washed up on the coast of The Netherlands, thus showing that they had not been properly moored in accordance with the requirements of article 3 of the eighth Hague convention. Not only had the German government not taken the proper precautions to insure neutral shipping against destruction by such mines, but it had not given neutrals proper warning in regard to the location of the mine fields. In the face of these facts the Dutch government felt obliged to protest in the most formal manner against the action of the German naval authorities in thus exposing peaceable fishing vessels to danger of destruction. In reply to this protest the German government expressed regret, but added that unfortunately it was not possible for Germany to "avoid this inconvenience." Germany had, it was asserted, complied with the requirements of the Hague convention, since the portion of the sea in which the mines had been found was embraced in the war zone which Germany had declared by the decree of February 4, 1915. Moreover, Germany had in its memorandum of July 11, 1915, called the special attention of neutrals to the danger from mines in the said zone, and "military interests of an imperative character" did not permit a more exact designation of the regions in which mines had been planted. In short, Germany having publicly proclaimed a portion of the open seas to be a war zone in which mines would be planted, it was the duty of neutral vessels to avoid exposing themselves to danger by traversing the forbidden waters, and if they were injured or destroyed in consequence of their having disregarded the public warning thus given, they and not Germany must bear the responsibility. To this extraordinary assertion of a right to exclude by means of mines neutrals from navigating the open seas the Dutch government replied in a *note verbale* of January 26, 1916, protesting that it was "contrary to the law of nations to declare a region which by reason of its vast extent could not be effec-

tively made a sphere of immediate military operations, to be a military zone." The Dutch government must therefore insist upon the freedom of navigation in the waters embraced within the zone thus declared by the Imperial government. Moreover, it could not admit that the German government had complied with the rules of the eighth Hague convention relative to the planting of submarine automatic contact mines. If the German government had intended to reserve the right to plant mines in almost the entire extent of the North Sea without designating the places where they were placed and without taking the necessary precautions to insure the safety of neutral navigation, it had failed to comply with the stipulations of article 3 of the Hague convention. The Dutch government could not admit an interpretation which would reduce to a nullity the evident meaning of the Hague convention to the detriment of the rights of neutrals and the requirements of humanity. To this protest the German government replied in a note of April 30, 1916, to the effect that the facts alleged in the Dutch protest did not prove that the Dutch fishing boats which had disappeared had been destroyed by German mines; on the contrary, it seemed more probable that they had been destroyed by English floating mines or mines moored near the Doggerbank and which had broken loose by the wind. Against the action of the British admiralty in October, 1914, announcing a mine-laying policy in certain designated areas of the North Sea, the Dutch government did not protest, since the admiralty warning had designated the parallels of latitude and longitude between which mines had been planted. It was not, therefore, regarded as contrary to the rules of the Hague convention.<sup>1</sup>

§ 221. **Provisions of the Hague Convention in Respect to Mines.** The employment of submarine mines as a mode of warfare was, as is well known, first resorted to on an extensive scale during the Russo-Japanese war, and the matter was first brought officially to the attention of the world by the Chinese delegation to the second Hague Conference in 1907.<sup>2</sup>

<sup>1</sup> The correspondence between the Dutch and German governments in respect to the planting of mines in the North Sea may be found in a Dutch orange book entitled *Recueil de Diverses Communications du Ministère des Affaires Étrangères aux États-Généraux par Rapport à la Neutralité des Pays-Bas et au Respect du Droit des Gens*, pp. 79 ff. La Haye, September, 1916.

<sup>2</sup> *La Deuxième Conférence de la Paix*, t. III, p. 663.

The acts of the First Hague Conference contained no provisions in respect to the employment of mines or torpedoes in war, and the Russo-Japanese war being the first in which they were used, there were, of course, no precedents in regard to the employment of such agencies. But it is clear that their use under certain conditions was not generally condemned. The manual for the use of British officers in the field contained a provision which declared mines to be legitimate weapons, and that those who used them were entitled to be treated as lawful combatants.<sup>1</sup> Nevertheless, the laying of mines in the open sea where they endangered neutral shipping was severely criticised by many writers at the time. The English Admiral Horsey, in a letter published in the *London Times*,<sup>2</sup> denounced the practice as "inhuman and a breach of international law and practice." Professor Holland<sup>3</sup> stated in a letter at the same time that "it is certain that no international usage sanctions the employment by one belligerent against another of mines or other secret contrivances which would, without notice, render dangerous the navigation of the high seas." Lawrence took a similar view.<sup>4</sup>

At the Second Hague Conference the British delegation proposed that the employment of unanchored automatic submarine contact mines and of anchored mines which do not become harmless upon breaking loose from their moorings, should be forbidden and that belligerents should be allowed to lay mines only in their territorial waters or those of the enemy. It was powerfully supported by Sir Ernest Satow, who declared that the high seas constitute a great international highway and that the right of neutrals to navigate those seas should take precedence of the transitory rights of belligerents to fight their battles thereon. But largely on account of the opposition of Marschall von Bieberstein, supported by the delegates of many of the smaller powers and a few of the larger ones, the English proposal was defeated and the results of the Conference, so far as they relate to the places where and the conditions under which mines may be laid by belligerents, are embodied in articles 2 and 3 of the convention relative to the laying of automatic submarine contact mines. Article 2 reads as follows: "It is forbidden to lay

<sup>1</sup> Smith and Sibley, *op. cit.*, p. 93.

<sup>2</sup> May 24, 1904.

<sup>3</sup> *London Times*, May 24, 1904.

<sup>4</sup> *War and Neutrality in the Far East*, p. 10.

automatic contact mines off the coasts and ports of the enemy, *with the sole object of intercepting commercial shipping.*" Article 3 reads: "When anchored contact mines are employed, every possible precaution must be taken for the security of peaceful shipping. The belligerents undertake to do their utmost to render these mines harmless within a limited time . . . and to notify the danger zones *as soon as military exigencies permit*, by a notice addressed to ship-owners . . ." <sup>1</sup>

It is quite clear from a reading of these and other articles of the Hague convention relating to mines, that the statement sometimes made that the convention prohibits the laying of mines in the open sea is quite without foundation, and that in other respects its provisions for the security of neutral shipping are inadequate. As Sir Ernest Satow pointed out in the course of the discussion of the convention: "There is nothing in its provisions to forbid belligerents placing mines, floating or anchored, on the high seas, nothing to prohibit them from placing mines off the coast of the enemy without regard to neutral shipping, for the proviso that these zones shall be notified 'as soon as military exigencies allow' is of little value." <sup>2</sup> Likewise the prohibition of the use of mines off the coast of the enemy, "with the sole object of intercepting commercial shipping, is futile, for a belligerent has merely to allege a different object to make it illusory, as, for example, to prevent the enemy from finding shelter or receiving supplies from a port." <sup>3</sup>

<sup>1</sup> Scott, *Texts of the Peace Conference at The Hague*, p. 254. Article 1 forbids the laying of unanchored automatic contact mines which do not become harmless within at least an hour after the person who laid them has lost control of them, and also the laying of such mines when anchored, which do not become harmless as soon as they have broken loose from their moorings.

<sup>2</sup> Higgins, *The Hague Peace Conferences*, p. 343; also Lémonon, *La Seconde Conférence*, p. 499, and Westlake, pt. II, p. 324. Cf. also a letter by Mr. Higgins to the *London Times* of September 14, 1914, where the same opinion is expressed. "The permission to belligerents," said Sir Ernest Satow, "to lay mines anywhere in the sphere of their immediate activity, was a permission to strew the high seas with mines. On the outbreak of war a catastrophe to a neutral ship would at once create a situation which in all probability diplomacy would be impotent to solve." The convention would therefore increase instead of diminish the causes of war. *Conférence Internationale de la Paix, Actes et Documents*, t. III, p. 380. Professor von Liszt of Berlin, in an article in the *Deutsche Juristenzeitung* of March 1, 1917, pp. 258 ff., defended the planting of mines in the open seas on the ground that it was not forbidden by the Hague convention. French text of his article in *Clunet*, 1917, p. 998.

<sup>3</sup> Cf. the views of Lord Loreburn, *Capture at Sea*, p. 139, where these provisions are declared to be little more than "benevolent expressions."

Even if the prohibitions of the convention afforded adequate safeguards to neutral shipping in the open seas, Germany might, if she had chosen to do so, have refused to regard it as binding on her because it had not been ratified by all the belligerents. But the German government did not take advantage of this circumstance to avoid the obligations which the convention created; on the contrary, it announced that it would act in accordance with the terms of the convention; it denied, however, the charge of having laid in the North Sea any mines of the prohibited class, and it declared that no fishing boats or vessels flying neutral flags were employed in the laying of mines anywhere.<sup>1</sup>

But quite apart from the Hague convention, neutrals have a right to navigate the high seas without being exposed to the danger of destruction by secret engines of warfare placed there by belligerents to injure their enemies. As Mr. A. Pearce Higgins justly observes:

"There are certain well-recognized principles which apply to this question of mine laying in the open sea, principles which were strongly emphasized by English jurists during the Russo-Japanese war. These found expression in the reservation made by the British government on signing and ratifying the mines convention; in this the British plenipotentiaries declared 'that the mere fact that this convention does not prohibit a particular act or proceeding must not be held to debar His Britannic Majesty's government from contesting its legitimacy.'"<sup>2</sup>

<sup>1</sup> The Dutch government in its protest of September 18, 1914, referred to above, however, asserted that the mines washed upon the shores of Holland were of German manufacture, leaving no doubt that a field of automatic contact mines had been planted in the North Sea by the Germans, that proper precautions had not been taken to prevent them from breaking loose from their moorings, and that no notice had been given to neutrals of the limits of the mined area.

<sup>2</sup> Mr. Thomas Gibson Bowles, a member of the English Parliament and a writer of note on international law, in a letter published in the *London Times* of September 9, 1914, severely criticised Sir Ernest Satow for having "very unwisely" voted for the mines convention and the British government for having "still more unwisely" ratified it. He adds: "Whether such a convention of the governments represented on this occasion at The Hague has given any sanction to the cowardly use of contact mines against belligerent and neutral shipping alike; whether, in short, a foreign office delegate and secretary can secretly give a sanction withheld by the law of nations to methods of warfare so inhuman, is a question to which I believe there can be but a negative reply.

"I myself feel absolutely confident that neither by the law of nations nor by any convention whatever can the unrestricted and deliberate assassination of harmless neutrals by concealed mines be either sanctioned or justified. And I feel equally confident that if and when the question arises our prize courts will so declare."



The question of laying mines has been considered by the Institute of International Law at several of its sessions since 1906, and it adopted a series of regulations, the first of which forbids the placing of either anchored or unanchored contact mines in the open seas.<sup>1</sup> This rule, that of absolute prohibition, is most in accord with the "principle of the freedom of the sea routes, the common highway of all nations," and it alone will "ensure to peaceful navigation the security to which it is entitled, despite the existence of war" — an object declared in the preamble of the Hague convention to be the principle by which the Conference was inspired.

§ 222. **The British War Zone of November, 1914.** If the policy of planting mines in the open seas was objectionable, the war zone decrees of Great Britain and especially of Germany were still more so, and both evoked spirited protests from neutral governments. The Dutch government, which, as stated above, refrained from protesting against the early British mine-laying policy as announced on October 3, 1914, because the limits of the mine areas were specifically designated, found itself obliged to enter a protest against the admiralty notice of November 3, 1914, that the whole North Sea would be considered as a "military area" in which merchant shipping of all kinds would be exposed to the gravest dangers in consequence of the presence of mines which it had been necessary to lay therein. In a communication of November 16, 1914, to the British minister at The Hague the Dutch minister of foreign affairs expressed the opinion that according to the law of nations the immediate sphere of military action alone constitutes a "military zone" in which the right of belligerent police may be exercised. A body of water of the area of the North Sea could not be considered in its whole extent as such a sphere of operations. In thus treating this region as a military zone, the British government was committing a grave infraction upon the freedom of the seas, a principle recognized by all nations. Under article 3 of the Hague convention respecting mine laying, belligerents were bound to take all possible precautions to insure the security of peaceful navigation. The admiralty warning of October 3 in designating the particular waters in which mines were laid was in conformity with this requirement. But it was otherwise

<sup>1</sup> *Annuaire*, 1906, p. 88; 1910, pp. 429-457; 1911, pp. 286-302; 1913, pp. 227-228.



with the notice of November 3, since it undertook to treat the whole North Sea as a danger zone, and while it provided for safety lanes, the routes indicated subjected Dutch ships navigating between the Atlantic and the southeast parts of England on the one side and the ports of The Netherlands on the other to grave inconveniences. Thus while the direct distance from Dover to a Dutch port was about one hundred and fifty miles, the safety route that had to be traversed exceeded one thousand miles. To this representation the British minister at The Hague replied on January 15, 1915, that in view of the large number of drifting German mines which were constantly being found, it was impossible to indicate any safe direct route to Dutch ports. The other questions raised in the Dutch note, particularly the general question as to the right of a belligerent to treat a vast open sea as a military zone, were entirely ignored by the British minister in his reply.

§ 223. **American Protest against the German Decree of February 4, 1915.** The German war zone decree of February 4, 1915, evoked an even stronger protest from neutrals, and the decree of January, 1917, was the chief cause of the outbreak of war between Germany and various American republics, including the United States. On February 10, 1915, the government of the United States addressed a note to the German imperial government, calling attention to the "very serious possibilities of the course of action contemplated under the proclamation of February 4" and requesting it "to consider before action is taken, the critical situation which might arise in case an American vessel should be destroyed or an American citizen should be killed." The German government was further reminded that "the sole right of a belligerent in dealing with neutral vessels on the high seas is limited to visit and search, unless a blockade is proclaimed and effectively maintained."

In a note dated February 18 the German government replied to the American note of February 10. The reply consisted largely of denunciation of the "lawless and inhumane" conduct of Great Britain, of veiled criticism of the American government for its toleration of British violations of the rights of neutrals, and of a defence of the German war zone decree as a measure of "overpowering military necessity" and a justifiable act of reprisal against Great Britain. The note affirmed that

hitherto Germany had "scrupulously observed valid international rules regarding naval warfare," and that the German government had put into force the Declaration of London without alteration and had observed its rules when some of them were diametrically opposed to the military interests of Germany. The British government, on the contrary, had not hesitated to violate the rules of the Declaration, and particularly it had by "a procedure contrary to all humanitarian principles" cut off all supplies from Germany, thereby endeavoring to starve the peaceful civil population of the empire. "In view of this situation the German government see themselves compelled after six months of patient and watchful waiting to meet England's murderous method of conducting maritime war with drastic counter-measures. If England invokes the powers of famine as an ally in its struggle against Germany with the intention of leaving a civilized people the alternative of perishing in misery or submitting to the yoke of England's political and commercial will, the German government are today determined to take up the gauntlet and to appeal to the same grim ally." Having proclaimed a war zone the limit of which had been exactly defined, Germany was determined to close this zone with mines and would endeavor to destroy hostile merchant vessels in every way, although it had no purpose of intentionally destroying neutral lives or property. But the action to be taken against Great Britain necessarily exposed neutral vessels within the war zone to dangers. This was a natural result of mine warfare. If in view of this warning neutral vessels should suffer injury within these "closed waters," they and not Germany would be responsible.

§ 224. The American Proposal of February 20, 1915. With a view to inducing the governments of Great Britain and Germany to modify in the interest of neutral rights the measures adopted by each against the other, the government of the United States on February 10, 1915, addressed an identical communication to the governments of both countries, in which the hope was expressed that they might, through reciprocal concessions, find a basis for agreement which would relieve neutral vessels engaged in peaceful commerce from the great dangers which they would incur on the high seas adjacent to the coasts of the belligerents. The American government, as a "sincere friend

desirous of embarrassing neither nation involved and of serving, if it may, the common interests of humanity," respectfully suggested: *First*, that Germany and Great Britain agree to abstain from sowing floating mines on the high seas, except within cannon range of harbors for defensive purposes only; and that all mines should bear the stamp of the government planting them and should be so constructed as to become harmless if separated from their moorings. *Second*, that neither belligerent should use submarines to attack merchant vessels of any nationality, except to enforce the right of visit and search. And *third*, that each would require its merchant vessels not to use neutral flags for the purpose of disguise or *ruses de guerre*.

To Germany it was suggested that importations of food stuffs from the United States (and from such other neutral countries as might ask it) should be consigned to agencies designated by the United States government, which agencies should have entire charge of their distribution and these food stuffs should be distributed solely to retail dealers having licenses from the German government, who in turn should be allowed to sell them to non-combatants only, such food stuffs not to be subject to requisition by the German government for any purpose whatsoever or to be diverted for the use of the armed forces.

To Great Britain it was suggested that food and food stuffs should not be placed upon the list of absolute contraband, and that shipments of such articles should not be interfered with by the British authorities when consigned to agencies designated by the United States government in Germany for receiving and distributing the same to licensed retailers.

§ 225. **Replies to the American Note.** In a note of March 1 the German government replied to the suggestions contained in the American communication of February 10, agreeing to abandon the use of floating mines and to employ only anchored mines constructed in accordance with the American suggestion. On the other hand, it did not appear feasible for belligerents to forego wholly the use of anchored mines for offensive purposes. The note also stated that the German government was prepared to undertake not to use submarines against the merchantmen of any flag, except when necessary to enforce the right of search, but in case the enemy character of the vessel or the presence of contraband should be established, the submarine would

“proceed in accordance with the general rules of international law.” The offer to thus restrict the use of submarines was, however, conditioned upon the abstention by enemy merchant vessels of the use of neutral flags, or of arming themselves and of resisting attacks, since such procedure, “contrary to international law,” would render impossible the employment of submarines in accordance with the rules of international law. The American suggestion in regard to importations of food stuffs was declared to be acceptable, subject to the condition that the importation of raw materials “used by the economic system of non-combatants,” including forage, should also be permitted. Finally, it was suggested that the inconveniences to which neutral shipping was necessarily exposed in maritime warfare might be still further reduced by prohibiting the conveyance of munitions of war from neutral countries to belligerents on ships of any nationality.

In a memorandum handed to ambassador Page on March 15 Sir Edward Grey stated that he did not understand from the reply of the German government that Germany was prepared to abandon the practice of sinking British merchant vessels by submarines, and it was evident from the reply that she would not abandon the use of mines for offensive purposes on the high seas. This being so, it was not necessary to make any further reply; nevertheless, he would avail of the opportunity to furnish a fuller statement of the whole position and feeling of the British government in regard to the matter. He then proceeded to review at length various unlawful acts which Germany had committed in violation of international law and the laws of humanity since the commencement of the war. As an offset to this array of atrocities committed by Germany, only two charges had been made against Great Britain: the laying of some anchored mines in the high seas, and the seizure of food stuffs alleged to have been destined to the civil population of Germany, neither of which could be sustained upon legal grounds. Some mines, it was admitted, had been laid, but they were anchored and so constructed as to become harmless when separated from their moorings. Moreover, no mines of any kind had been laid by the British authorities until many weeks after the German mine policy had made counter-measures a necessity. As to the cutting off of the German food supply from abroad, that was

"an admitted consequence of blockade." Furthermore, the seizure of food stuffs destined for the use of the civil population, although not in harmony with the practice of Great Britain and the United States, was regarded by some nations as a natural and legitimate method of bringing pressure to bear on an enemy country, as it is upon the defence of a besieged place, and the opinions of Prince Bismarck and Count Caprivi were quoted in support of this view.

In conclusion, the memorandum stated that the governments of Great Britain and France were resolved to meet the German measures by stopping the shipment of supplies to or from Germany; but, differing from the German policy, they proposed to accomplish their purpose without sacrificing neutral ships or non-combatant lives or inflicting upon neutrals the damage that must result when a vessel and its cargo are sunk without warning, examination, or trial. This measure,<sup>1</sup> it was added, "was a natural and necessary consequence of the unprecedented methods, repugnant to all law and morality," described above, "which Germany began to adopt at the very outset of the war, and the effects of which have been constantly accumulating."

§ 226. **The Dutch Protest.** Protests against the German war zone decree of February 4 were also made by the governments of The Netherlands, Greece, Italy, and other neutral powers. On February 12, 1915, two days after the despatch of the first American note of protest, the Dutch government addressed a communication to Germany in which, adverting to the German allegation that neutrals had acquiesced in the unlawful measures adopted by Great Britain, it reminded the German government that it had in a note of November 16, 1914, vigorously protested against the British proclamation of November 3 declaring the North Sea to be a military area, and that it had never regarded the British measure as being in conformity with international law or the principle of the freedom of the seas. It had, in addition, protested against the British compulsion by which the governments of The Netherlands as well as other neutral governments had been compelled to lay embargoes on exports to Ger-

<sup>1</sup> The measure here referred to was an order in council of March 11, virtually establishing a blockade of Germany. It was not described as a blockade in the order in council, but in Sir Edward Grey's memorandum summarized above it was so designated.

many, and it had protested against other measures of the Entente allies in restraint of neutral commerce. If those measures had effectively cut off trade with Germany, the government of The Netherlands was in no way responsible. Again, the Dutch government maintained that the German war zone decree, like that of Great Britain, constituted an unlawful encroachment upon the principle of the freedom of the seas and asserted that belligerents had no right to interfere with neutral navigation in regions of the open seas which did not constitute a "sphere of immediate military operations."<sup>1</sup>

§ 227. *Legality of Maritime War Zones.* There are no instances in the wars of the past of resort to measures exactly analagous to the war zone decrees of Great Britain and Germany during the late war,<sup>2</sup> and the question of their legitimacy had

<sup>1</sup> Text of the Dutch note in the orange book, *Recueil de Diverses Communications du Ministère des Affaires Étrangères aux États Généraux, etc.*, pp. 94-96.

<sup>2</sup> Somewhat analagous, however, to the war zones proclaimed by Great Britain and Germany were the "strategic areas" proclaimed by Japan in January, 1904, prior to the outbreak of the war with Russia. On January 23 an ordinance containing the following provisions was issued:

"ART. 1. In case of war or emergency, the minister of the navy may designate a defence sea area under this ordinance. The designation, or revocation, of such defence sea area shall be advertised by the minister of the navy.

"ART. 3. In the defence sea area, the ingress and egress and passage of any vessels other than those belonging to the army or navy are prohibited from sunset to sunrise.

"ART. 4. Within the limits of naval and secondary naval ports included in a defence sea area the ingress and egress and passage of all vessels other than those belonging to the army or navy are prohibited.

"ART. 5. All vessels which enter, leave, pass through, or anchor in a defence sea area shall obey the direction of the commander in chief of the naval station, or the commandant of the secondary naval station concerned."

In pursuance of this ordinance some twelve or more "strategic areas" were declared embracing the bays at Tokio, the waters about the Pescadores Islands, those adjacent to the naval stations of Sasebo and Nagasaki, the Touguru straits, etc. In some cases these areas appear to have embraced portions of the high seas as far out as ten miles from the coast (cf. *International Law Situations*, Pubs. of the Naval War College, for 1912, p. 126). Among the grounds on which the Chinese vessel *Quang-nan* was condemned by the Japanese prize court was that it appeared to be reconnoitering in the "strategic area" about the Pescadores Islands (Hurst and Bray, *Russian and Japanese Prize Cases*, Vol. II, pp. 343-353). The question of maritime war zones was considered by the Naval War College of the United States in 1912, and the conclusion was reached that a belligerent may assume for his own protection a measure of control over waters which in time of peace would be outside his jurisdiction. But it would seem that Germany and probably Great Britain, in closing or subjecting to restrictions the navigation of vast areas of the open seas extending far from their coasts, went much further than the Japanese did or what the Naval War College intended to



not been the subject of examination by writers on international law. The principle of the freedom of the seas, subject to certain exceptions, has, however, long been an accepted doctrine of the law of nations, and it has been assumed by all writers that no belligerent could lawfully close a portion of the open seas to neutral navigation or exercise control over neutral commerce traversing them further than such as is incidental to the rights of search, visit, and blockade. Unquestionably the naval forces of a belligerent have a right to engage the enemy and prey upon his commerce anywhere on the high seas. In a certain sense, therefore, the outbreak of war between two or more maritime powers automatically converts that portion of the high seas which becomes a sphere of immediate military operations into a war zone, and belligerents may formally proclaim such waters to be a theatre of hostilities. Within this area they are entitled to exercise to the fullest extent their rights of capture and destruction as against the enemy. Neutral vessels venturing into such waters are, therefore, exposed to destruction in the same way that a non-combatant individual is who in land warfare strays into the lines which embrace the theatre of military operations. It is, of course, the duty of belligerents to warn neutrals of the danger to which their vessels will be exposed by venturing into such waters and to use every endeavor to avoid injuring or destroying those who do so through error or otherwise. But in case they suffer injury in consequence of their disregard of the warning thus given, neither of the contending belligerents can hardly be held responsible. But the waters embraced within such zones remain, as before, a portion of the high seas, and a belligerent probably has no greater rights of search, capture, or destruction in respect to enemy or neutral vessels therein than he has outside the area.<sup>1</sup> In short, belligerents have

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sanction. On April 5, 1917, after the outbreak of war between the United States and Germany, President Wilson issued a proclamation creating "defensive areas" about certain ports and harbors on the Atlantic coast. These areas extended from two to ten miles from the harbors which they were designed to protect. Entrances were designated through which incoming and outgoing vessels were allowed to proceed, their rate of speed was limited to five knots per hour, they were required to follow certain directions given by the harbor patrol, and they were prohibited from passing in or out between sunrise and sunset. (Text of the proclamation in the *New York Times*, April 14, 1917.)

<sup>1</sup> A few writers, of whom Phillimore is one, maintain that belligerents have a certain right of control over those portions of the high seas which constitute



no right to appropriate any portion of the high seas and close them to the navigation of neutral vessels, and it is very doubtful whether they may lawfully plant mines in them in such a way as to expose neutral ships to the danger of destruction while peacefully navigating the waters thereof. Sir Ernest Satow at the Second Hague Conference stated a principle that ought never to be disputed when he declared that the high seas constitute a "great international highway," and that the right of neutrals to navigate those seas should take precedence of the transitory rights of belligerents to fight their battles thereon.

The action of the British government in proclaiming the whole North Sea to be a military area in which mines on an extensive scale were planted constituted, therefore, a serious infringement upon the principle of the freedom of the seas, although it may be said in extenuation of the measure that safety lanes were provided, and every endeavor was made by the admiralty to insure the safety of neutral navigation within the area. Pilots and sailing directions were furnished to the masters of vessels wishing to traverse the waters within the zone, and it does not appear that a single neutral vessel which complied with the admiralty directions ever came to grief by running into a British mine. The only injury, therefore, which neutrals actually suffered was that which resulted from the delays, inconveniences, and expense due to the necessity of traversing the longer and more devious routes prescribed by the admiralty directions. The German decree of February 4, 1917, was far more objectionable, not only because it contained an announcement that all enemy vessels would be destroyed within the prohibited zone, even if it were not possible to save their crews and passengers, but because it contained an intimation that neutral

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the theatre of war. That portion of sea, Phillimore argues, which is actually occupied by a fleet, is within the dominion of the nation to which the fleet belongs, so long as it remains there, its position being somewhat analogous to that of an occupying army in land warfare (*International Law*, Vol. III, § cc. iii). Dr. Hans Wehberg, in an article in Stier-Somlos' *Handbuch des Völkerrechts* (1915), defended the "war zone" doctrine as applied by the German admiralty. From the earliest times, he says, belligerents have assumed the right — and neutrals have rarely questioned it — to make the open sea a theatre of war (*Kriegsschauplatz*). This will readily be admitted, but manifestly the German decree went much further than merely proclaiming a portion of the sea to be a theatre of hostilities. Compare the addresses of Hershey and Brown in *Procs. Amer. Soc. of Int. Law*, 1916, pp. 87, 92.

vessels were likely to suffer a similar fate. Moreover, the provision in respect to lanes of safety was inadequate, and little or no attempt was made by the German admiralty to pilot and direct neutral vessels through the zone, thus insuring them against destruction. In consequence, many neutral vessels were sunk within the zone either by German mines or submarines. As for the German war zone decree of January, 1917, it was so flagrantly contrary to the laws of maritime warfare that nothing can be said in defence of it.

## CHAPTER XV

### *SUBMARINE WARFARE*

§ 228. The Submarine Torpedo Boat as an Instrument of Warfare; § 229. The Sinking of the *Lusitania*; § 230. The German Defence; § 231. The German Defence Analyzed; § 232. Liability of Enemy Merchant Vessels to Destruction; Exempt Vessels; § 233. Opinions of the Authorities as to the Right of Destruction; § 234. Past Practice as to the Sinking of Prizes; § 235. Restrictions and Conditions; § 236. Duty of the Captor to Provide for the Safety of Passengers and Crew; § 237. Practice in Former Wars; § 238. German Procedure during the Recent War; § 239. Its Unlawfulness; § 240. German Arguments; § 241. The German Arguments Analyzed; § 242. Setting Crews and Passengers Adrift in Small Boats; § 243. Other Submarine Atrocities.

§ 228. **The Submarine Torpedo Boat as an Instrument of Warfare.** The recent war differed from all others in the past not only because of its vast magnitude but by reason of the large number of new instruments, agencies, and methods that were employed in its prosecution. The most effective of the new weapons of destruction was the submarine torpedo boat. Formerly the principal craft employed by belligerents in the conduct of naval operations were battle ships and cruisers, both of which navigate upon the surface of the ocean and which ordinarily contain facilities for the accommodation of crews and passengers. The existence of these facilities, superadded to the considerations of humanity, made easy the early adoption of a rule of maritime warfare which imposes upon naval commanders an obligation to provide for the safety of persons aboard enemy merchant ships before sinking them. This rule was from the first a universally recognized custom of naval warfare, and ultimately it found its way into the international conventions dealing with the conduct of war at sea and was also incorporated in the prize codes of practically all maritime States. The invention of the submarine torpedo boat, however, raised the question — at least among the Germans — as to whether the rule was obligatory upon the commanders of such craft, since they have no facilities for taking care of the persons on board the merchant vessels which they destroy; besides, they are fragile

in construction and slow of speed and consequently possess little power of resistance. These circumstances, the Germans argued, put the submarine in an entirely different class from cruisers, and therefore the rule governing prize destruction by the latter did not apply to the operation of the former. The question became a vital one to the Germans when their battle ships and cruisers were driven from the ocean and the only craft left which they could employ against the commerce of the enemy consisted of submarines.

§ 229. **The Sinking of the *Lusitania*.** The attention of the world was first drawn to the shocking inhumanity of the German methods of submarine warfare by the torpedoing, on May 7, 1915, of the *Lusitania*, one of the largest and best known of the British transatlantic liners. It had on board over two thousand persons; practically all of them were non-combatants, many were neutrals, and a considerable number were women and children. The vessel was torpedoed without a moment's warning and with little opportunity for the passengers to save themselves by taking to the life-boats. The huge liner sank within twenty minutes after the discharge of the torpedo, and some twelve hundred persons were drowned, one hundred and fifteen of them being American citizens. The act aroused intense indignation throughout the world and was widely denounced as murder. Strong protests were promptly made by the governments of the United States and various other neutral powers. The American protest, dated May 13, declared the act to be "absolutely contrary to the rules, the practices, and the spirit of modern warfare" and a "violation of many sacred principles of justice and humanity."

§ 230. **The German Defence.** On May 10, three days after the sinking of the *Lusitania*, the German foreign office expressed to the government of the United States its "deepest sympathy" for the loss of lives on the vessel, but at the same time declared that the responsibility<sup>1</sup> rested upon the British government,

<sup>1</sup> There was general rejoicing throughout Germany and even among Germans in neutral countries over the sinking of the *Lusitania*. German schools are reported to have taken a holiday, and medals commemorating the event were struck off and sold in large numbers. Facsimile reproductions of the medals may be found in Ambassador Gerard's *My Four Years in Germany*, p. 239. Mr. Gerard states that the issuing of these medals was done with the consent of the German government. He adds, however, that the Emperor told him that he would not

"which through its plan of starving the civilian population of Germany has forced Germany to resort to retaliatory measures." British merchant vessels, it added, were "generally armed with guns and had repeatedly tried to ram German submarines, so that a previous search was impossible." They could not, therefore, be treated as ordinary merchant vessels. Finally, the German government, in spite of its heartfelt sympathy for the loss of American lives, could not but "regret that Americans felt more inclined to trust English promises than pay attention to the warnings from the German side."

In addition to the assertion of a general right to sink without warning all enemy merchant vessels and without making provision for the safety of the persons on board, the German government and its apologists put forward various special arguments in defence of the sinking of the *Lusitania*. In the first place, it was alleged that she was not an ordinary unarmed merchantman but an auxiliary cruiser enrolled in the navy list published by the British admiralty and was built largely through the aid of funds appropriated by the British government. Moreover, she carried armament including six four-inch guns which, it was claimed, were mounted under deck and masked. Indeed, the German government claimed to have "reliable information" that for some time past practically "all the more valuable English merchantmen had been provided with guns, ammunition and other weapons and reinforced crews specially practiced in manning guns."<sup>1</sup> The British admiralty, it was further asserted, had by a secret order issued in February advised the masters of merchant vessels not only to seek protection under the cover of neutral flags, but when so disguised, to attack German submarines, rewards having been promised and in some cases actually paid for successful resistance to submarine attacks.

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have permitted the torpedoing of the *Lusitania* had he known that it was contemplated, and that "no gentleman would kill so many women and children." But the ambassador remarks that he must have been familiar with the instructions which had been issued to submarine commanders, as it was hardly probable that he was ignorant of the embassy warning widely published in the American press. "It is also significant that the Emperor decorated the captain of the submarine with the order *pour le mérite* in recognition of his gallant act in torpedoing the *Lusitania*."

<sup>1</sup> Note of May 28, 1915, European War, No. 2 (Diplomatic Correspondence with Belligerent Governments Relating to Neutral Rights and Duties, pp. 169-170).

Again, the *Lusitania*, it was contended, was not a peaceful trading and passenger ship, but she carried Canadian troops and a large quantity of ammunition destined for the "destruction of brave German soldiers who were fulfilling with self-sacrifice and devotion their duty to the fatherland." "The German government," it was said in a note of May 28, 1915, "believes that it acts in just self-defence when it seeks to protect the lives of its soldiers by destroying ammunition destined for the enemy with the means of war at its command. The English steamship company must have been aware of the dangers to which passengers on board the *Lusitania* were exposed under the circumstances. In taking them on board in spite of this the company quite deliberately tried to use the lives of American citizens as protection for the ammunition carried, and violated the clear provisions of American laws, which expressly prohibit, and provide punishment for, the carrying of passengers on ships which have explosives on board. The company thereby wantonly caused the death of so many passengers. According to the express report of the submarine commander concerned, which is further confirmed by all other reports, there can be no doubt that the rapid sinking of the *Lusitania* was primarily due to the explosion of the cargo of ammunition caused by the torpedo. Otherwise, in all human probability, the passengers of the *Lusitania* would have been saved."

Finally, it was argued that the destruction of the *Lusitania* was a justifiable act of reprisal against Great Britain for "her inhuman attempt to starve the civil population of Germany by means of an unlawful blockade and an unwarranted extension of the rules relating to contraband."<sup>1</sup> The drowning of a few hundred non-combatant enemy persons or even of neutrals was no greater crime than the slow starvation of a whole nation. The British government had "repudiated all the rules of international law and disregarded all the rights of neutrals. It had closed the North Sea with poorly anchored mines and had blockaded neutral coasts and ports in violation of international law. Germany had therefore been driven to adopt in self-defence the measures which she was now applying; she was forced to choose between starvation and the relinquishment of her independence."

<sup>1</sup> Professor John W. Burgess, formerly of Columbia University, gave his support to this extraordinary contention. Cf. his *America's Relations to the Great War* (1916), ch. I. Cf. also a book by Dr. Hans Steinuth entitled *England und der U-Boot Krieg* (Stuttgart, 1916), in which the sinking of the *Lusitania* was defended as an act of reprisal.

As to the *Lusitania*, it was impossible to give the ship sufficient warning to enable the passengers and crews to take to the lifeboats without exposing the attacking submarine to the danger of destruction.<sup>1</sup> In any event, the time allowed would probably have been sufficient to enable the passengers to leave the vessel had the sinking not been hastened by the presence of a large quantity of highly explosive materials which it carried in violation of the laws of the United States. As a matter of fact, official warning had been given by publication in American newspapers to all persons intending to take passage on the *Lusitania* that an attempt would be made to destroy the vessel; consequently the responsibility rested in part at least upon those who deliberately disregarded the warning thus given. Finally, the German government was unwilling to admit that the presence of neutral persons on board the *Lusitania* conferred any immunity whatever upon her. There was no compelling necessity for neutrals to travel on ships flying a belligerent flag, and the suggestion was made in the German note of June 9 that Americans should refrain from travelling on British ships. It was even intimated that the British government encouraged Americans to take passage on British liners with a view to conferring an immunity on such vessels against the exercise of the belligerent right of destruction.<sup>2</sup>

The sinking of the *Lusitania* was defended by a group of twenty-two distinguished German professors, including Bindung,

<sup>1</sup> Dr. Noldecke, a judge of the German superior court at Hamburg, in an article published in the *Hamburger Fremdenblatt* of May 10, 1915, argued that the warning issued by the embassy at Washington was a sufficient compliance with the requirements of international law. He said, "And if, in general, previous information must be given, this too is not lacking. Nobody will, in international law, demand a formal registered transmission of such information. It suffices that there should be called previously to the clear cognizance of the ship destined for destruction the fact that this destruction threatens it. This, in the present case, happened in more than sufficient measure."

Cf. also the following from an interview given out by Dr. Dernburg: "We gave ample warning that every English ship plying to or from a British port after March 18 was going to be torpedoed, with only such warning as the necessities of the case permitted. To venture into the English war zone is like going into a house that is burning. Americans who wish to keep out of harm's way might patronize the American flag."

<sup>2</sup> The *Frankfurter Zeitung* of May 9, 1915, made this charge. Dr. Dernburg in a statement published in the United States on May 10 asserted that Americans were being used as a "shield to get war material into England." Cf. also Burgess, *op. cit.*, p. 42.



Fleishmann, Hatchek, Kohler, Laband, Rehm, Strupp, Triepel, and Wach in a symposium published in 1915.<sup>1</sup> In general their argument was that the rules of cruiser warfare do not apply to submarine warfare, and therefore the submarine which sank the *Lusitania* was not bound to give warning in order to allow the passengers time to take to the life-boats, nor was it bound to provide for their safety.<sup>2</sup>

The fact that neutrals were affected, said Professor Rehm, did not alter the situation. Moreover, her destruction was a "perfectly justifiable" measure of reprisal, even if she had been an ordinary merchant vessel without any contraband at all on board. Neutral governments, said Professor Triepel, had no just ground to complain because their citizens were lost. The measure was "severe," but it was

"necessary and imperative in order to injure the enemy and to attain the object of our war. We direct our submarines against England and her allies. We do not intend to injure neutral persons and goods. If it happens, contrary to our wishes, it is due to circumstances which every neutral can avoid. The shot which was fired against the *Lusitania* was an act of war against Great Britain only; it was a legal act, and no neutral can hold us responsible for it — not even that neutral whose citizens, to our honorable regret, were injured thereby."<sup>3</sup>

"Whether the warning issued by the German ambassador at Washington through the press to Americans contemplating taking passage on the ship was improper diplomacy or not, it was evidence of our good will and humane thought."<sup>4</sup>

It was the duty of the American government to prevent "inhuman and insidious English ship-owners from taking on board a death-ordained ship a number of innocent passengers."<sup>5</sup>

<sup>1</sup> Entitled *Der Lusitania-Fall; ein Urteil von deutschen Gelehrten* in the *Zeitschrift für Völkerrecht*, Bd. IX, pp. 159 ff.

Cf. also a monograph by Dr. Christian Meurer entitled *Der Lusitania-Fall* (Tübingen, 1915).

<sup>2</sup> Cf. especially Professor Fleishmann's argument, *ibid.*, p. 159.

<sup>3</sup> *Ibid.*, pp. 232-233.

<sup>4</sup> *Ibid.*, p. 234.

<sup>5</sup> *Ibid.*, p. 235. Dr. Strupp likewise argued that the commander of the submarine was under no obligation to warn the *Lusitania* or to provide for the safety of those on board. He was justified on the ground of military necessity in disregarding the existing rules of international law even if they applied to submarine warfare. Professor von Liszt of the University of Berlin in an article published in the *Deutsche Juristen-Zeitung* for March 1, 1917 (pp. 258 ff.), argued that German submarine warfare was fully authorized by the Hague conventions, and that it was child's play compared with the inhumanity of English methods. Quoted in 44 *Clunet*, p. 999.

§ 231. **The German Defence Analyzed.** Leaving aside for the present the consideration of the general question of the legality of the submarine as an instrument of war, as it was employed by the governments of Germany and Austria-Hungary, let us examine the particular contentions put forward by the German government and its supporters in defence of the sinking of the *Lusitania*.

Regarding the contention that the *Lusitania* was not an ordinary merchant vessel but an auxiliary cruiser and therefore must be assimilated to the status of a war ship which may be torpedoed without warning, it appears to have been true that it was a subsidized vessel and was enrolled in the royal naval reserve, like the merchant vessels of many nations. But it was not a war vessel; it was not commanded by a naval officer who carried a "commission of war"; it was not "embodied in the armed forces" of the British government.<sup>1</sup>

Legally and in fact the *Lusitania* was nothing but a peaceful trading and passenger vessel, and the arguments by which it was sought to convert it into a war ship were subtle and specious and can have no weight with those who attach more importance to substance than to technicality.

The assertion that the *Lusitania* was armed was pronounced by the British government to be "wholly false," and this was the testimony of her captain. Moreover, the collector of the port of New York, from which the vessel sailed, officially reported that "the *Lusitania* was inspected before sailing, as is customary, and no guns were found mounted or unmounted, and the vessel sailed without any armament."<sup>2</sup>

§ 232. **Liability of Enemy Merchant Vessels to Destruction; Exempt Vessels.** Are such methods of warfare permissible under the law of nations? May the submarine be lawfully employed for the destruction of enemy merchant vessels?<sup>3</sup>

<sup>1</sup> In July, 1916, the German military authorities shot as a sea *franc-tireur* Captain Fryatt, the master of a British merchant vessel which attempted to thwart the attack of a submarine, on the ground that his ship was not "embodied in the naval forces" but was a merchant vessel. Legally its status was the same as that of the *Lusitania*. Therefore, if the *Lusitania* was in effect a war ship, as the Germans contended, were they justified in refusing to treat Captain Fryatt's vessel as a war ship and in shooting him as a pirate?

<sup>2</sup> Professor Burgess, *op. cit.*, p. 48, questions the good faith of the examination made by the collector of the port, but there is no ground for his contention.

<sup>3</sup> The destruction of neutral merchant vessels is considered in ch. 31.

In general, the right of a belligerent to sink the merchant ships of the enemy is recognized by international law and practice, although there are certain classes of such vessels that are exempt from capture and, of course, from destruction. The Hague convention of 1907 respecting the right of capture in maritime warfare laid down the rule that vessels charged with religious, scientific, or philanthropic missions are exempt from capture (article 4), and so are vessels employed exclusively in coast fisheries and small boats employed in local trade, provided they take no part in hostilities (article 3).<sup>1</sup> Not being liable to capture, they cannot of course be destroyed.<sup>2</sup> Finally, the Hague convention of 1907 for the adaptation of the principles of the Geneva convention to maritime war (article 2) declares that hospital ships, equipped wholly or in part at the expense of private individuals or officially recognized relief societies, shall be exempt from capture.

§ 233. **Opinions of the Authorities as to the Right of Destruction.** With these exceptions, the right of destruction under certain conditions is generally admitted, although it is a universally recognized principle of international law that all prizes ought, if possible, be taken into a prize court in order to have the lawfulness of their capture judicially determined. That a captor has a right, says Bentwich, to sink an enemy vessel cannot be doubted, though it is always preferable to bring it in for adjudication.<sup>3</sup> Almost all publicists, says Bonfils, admit the right of a captor to destroy a prize in case of *force majeure* or absolute necessity, and he cites in support of

<sup>1</sup> This immunity, however, does not apply to vessels engaged in deep-sea fishing. In the early part of the war the British prize court condemned the *Berlin*, a German vessel engaged in deep-sea fishing. Trehern, *British and Colonial Prize Cases*, Vol. I, p. 29.

<sup>2</sup> In fact, vessels of this class were frequently sunk by German submarines. The Dutch newspaper *Handelsblad* of May 18, 1915, stated that "recently the Germans sunk more than twenty defenceless fishing boats." The London *Gazette* of October 15, 1915, stated that during the first year of the war British practice had been mainly to search German trawlers and allow them to proceed unless there were reasons for taking them in. Later the policy of capturing them was adopted in consequence of the German practice of sinking such vessels. The Germans appear to have defended their practice on the alleged ground that British trawlers were being used as mine sweepers and were armed for the destruction of submarines.

<sup>3</sup> *Law of Private Property in War on Land and Sea*, p. 93; cf. also Lawrence, *Principles of International Law* (4th ed.), p. 483.

this view Valin, Pistoye et Duverdy, Calvo, Bluntschli, Bulmerincq, Gessner, Perels, Bernard, De Boeck, Martens, Travers-Twiss, Wildman, Hall, and Kent. To this list may be added Wheaton, Phillimore, Risley, Oppenheim, Lawrence, Holland, Westlake, Pradier-Fodéré, and many others, though most of them limit the right to cases of absolute necessity. There are, however, some authorities who do not approve the right of destruction under any circumstances. The whole practice, says Woolsey, is "a barbarous one and ought to disappear from the history of nations."<sup>1</sup> Bluntschli<sup>2</sup> and Heffter<sup>3</sup> allow it only in case of absolute necessity, and Bluntschli adds that every infringement upon this principle is a violation of the law of nations. Perels holds that a captor may never destroy until his right of ownership has been determined in a prize court,<sup>4</sup> and Kleen takes the same view.<sup>5</sup> All the reasons, says Dupuis, in favor of the destruction of prizes are bad, and the practice should be prohibited.<sup>6</sup> The right has often been sustained by the British and American admiralty courts. Lord Stowell affirmed that captors cannot properly permit "enemy property to sail away unmolested. If impossible to bring it in, their next duty is to destroy it."<sup>7</sup> Dr. Lushington likewise held that it may be justifiable or even praiseworthy of the captors to destroy an enemy vessel.<sup>8</sup>

§ 234. **Past Practice as to Sinking of Prizes.** The prize regulations of most States expressly authorize destruction under certain conditions,<sup>9</sup> and in practice it has frequently been resorted to in the wars of the past. During the American Revolution many British and some American merchantmen were destroyed by enemy cruisers. During the war of 1812 the captain of the *Constitution* was instructed that "the commerce of the enemy is the most vulnerable point we can attack, and its destruction the main object; and to this end all your efforts should be

<sup>1</sup> *International Law*, § 148.

<sup>2</sup> *Le Droit International Codifié* (Lardy), § 672.

<sup>3</sup> *Droit International*, § 138.

<sup>4</sup> *Internationale öffentliche Seerecht der Gegenwart*, p. 299.

<sup>5</sup> *Les Lois de la Neutralité*, Vol. II, p. 531.

<sup>6</sup> *Le Droit de la Guerre Maritime*, p. 369.

<sup>7</sup> *The Felicity* (1814), 2 Dodson's Admiralty Reports, 381.

<sup>8</sup> *The Leucade* (1855), Spink's Admiralty Reports, 221; cf. also the American case of *Jecker v. Montgomery* (1851), 13 How. 498.

<sup>9</sup> Cf. the texts in *International Law Situations* for 1905, pp. 64-67, and for 1907, pp. 77-79.

directed. Therefore unless your prizes shall be very valuable and near a friendly port, it will be imprudent and worse than useless to attempt to send them in." Somewhat similar instructions were given other commanders.<sup>1</sup> In pursuance of these instructions, seventy-four British merchantmen are said to have been destroyed.<sup>2</sup> As is well known, many merchant vessels were sunk or burned by the commanders of Confederate cruisers during the Civil war, there being no ports open into which they would take their prizes. Semmes was instructed by the Confederate secretary of the navy to do the enemy's commerce the greatest injury in the shortest time.<sup>3</sup> During the Franco-German war of 1870-1871 two German merchant vessels (the *Ludwig* and the *Vorwärts*) were burned by the French on account of inability to spare prize crews, and a French steamer (the *Max*) was burned by the Germans.<sup>4</sup> During the Russo-Turkish war of 1877 and the Russo-Japanese war of 1904-1905,<sup>5</sup> enemy merchant vessels were destroyed by Russian cruisers; and during the Spanish-American war three Spanish merchant vessels were destroyed by an American cruiser.<sup>6</sup>

✓ From this summary it is clear that the right to destroy, under certain conditions, enemy merchant ships without taking them into a prize court has been so often exercised in practice that its

<sup>1</sup> Moore's *Digest of International Law*, Vol. III, pp. 516-517.

<sup>2</sup> Hall, *op. cit.*, p. 547.

<sup>3</sup> The extraordinary success with which these instructions were carried out is interestingly told in his *Service Afloat during the War between the States* (Baltimore, 1887). Cf. pp. 385-386 for his justification of the right to destroy enemy vessels. His own acts, he asserts, were far less open to objection than the destruction of British merchant vessels by John Paul Jones, since every American port was open to Jones, whereas there was not a single port into which he (Semmes) could take a prize. He sent some prizes to Cuba and Venezuela, but they were "handed over to the enemy." "Unlike Jones," he says, "I had no alternative. There was nothing left for me to do but destroy my prizes, and this course had been forced upon me by the nations of the earth."

<sup>4</sup> Bonfils, *Droit International Public*, § 1415. Apparently von Liszt considers the destruction of the German merchant ships in 1870 by the French as a violation of international law. Cf. his *Das Völkerrecht*, p. 351. The Germans so regarded it and authorized reprisals against the French.

<sup>5</sup> Takahashi, *International Law as Applied in the Russo-Japanese War*, pp. 275-330. According to Takahashi, twenty-one of the twenty-four Japanese ships captured by the Russians were destroyed.

<sup>6</sup> Benton, *International Law and Diplomacy of the Spanish-American War*, p. 178. This act was criticised by Lefur in the *Revue de Droit Int. Pub.*, Vol. V, p. 809, as unjustifiable. The United States authorities, however, claimed that the ships were transports.

legality can hardly be contested at this time. And owing, as Hall<sup>1</sup> points out, to the wide range of modern commerce, the inability of modern cruisers to spare prize crews, and the growing indisposition of neutrals to admit prizes within their ports,<sup>2</sup> convenience and self-interest are continually inducing belligerents to exercise more frequently their rights of destruction instead of taking vessels in. If the right of destruction were not allowable, German measures against the commerce of England would have been practically impossible, for the reason that submarines, which were almost the only German naval craft left in actual service, are not fitted for taking prizes in. With neutral ports closed to her prizes, her own ports effectively blockaded, and employing craft which were unsuited to the conveyance of prizes to distant ports, nothing remained but to destroy or release them.<sup>3</sup> It seems likely that the introduction on a wide scale of mine and submarine warfare will have the effect of making destruction the rule and prize adjudication the exception in the wars of the future, unless the right of destruction is forbidden by general agreement. Exercised subject to the conditions to be described below and confined to enemy vessels, it is difficult to see wherein lies the harsh criticism of the practice made by Woolsey and a few others, so long as the right of capture in maritime warfare is recognized as lawful. If the enemy character of the ship is undoubted, capture extinguishes the right of the former owner, and it belongs to the

<sup>1</sup> *International Law*, p. 457. Cf. also Lawrence, *op. cit.*, p. 406, and the report of a Committee of English jurists, in *Pubs. of the Grotius Society*, Vol. IV, pp. xxxi, ff.

<sup>2</sup> Most neutral states now forbid belligerents to bring prizes into their ports (for examples of such regulations cf. *International Law Situations*, 1907, pp. 76-77). The Hague convention in respect to neutral rights and duties in maritime war forbids the setting up of prize courts by belligerents in neutral territory (art. 4) and the bringing of prizes into neutral ports, subject to a few exceptions (art. 21). The effect is to make resort to "quarter deck" courts and the destruction of prizes a practical necessity in the case of a belligerent whose own ports are closed by a blockade or otherwise. The wisdom of the provision may well be doubted.

<sup>3</sup> Valois, *Germany as a Naval Power*, p. 57, calls attention to the fact that in a possible war between Germany and England the German cruisers would have scarcely any chance of bringing their prizes in, and they would therefore be forced to destroy them. "The German zones of protection lie too far away from a probable theatre of maritime warfare. The prizes we took would thus be generally recaptured from us by the English on the way to a German port. On the other hand, England by a deliberate policy has for hundreds of years acquired colonies everywhere and can easily carry the prizes into one of its numerous ports."



captor to do what he will with his property, and ordinarily it is immaterial to the former owner whether his ship is sunk or condemned by a prize court and sold.<sup>1</sup> Destruction of neutral prizes or of neutral property or non-combatant persons on an enemy vessel is, however, a wholly different matter.

§ 235. **Restrictions and Conditions.** Having stated the law and practice in regard to the right of a belligerent to destroy enemy merchant vessels subject to the exceptions mentioned, we may now consider the limitations upon the exercise of the right. An extended examination of the opinions of international law writers, the decisions of the admiralty courts, and the naval prize regulations of the more important States fails to reveal any opinion whatever in favor of the right to destroy merchant vessels under any and all circumstances and subject to no restrictions. The universal opinion, at least before the late war, was that destruction is permissible only in certain exceptional cases and always subject to the observance of certain rules by the captor.

The instructions issued by the United States government to blockading vessels on June 20, 1898, stated that

"if there are any controlling reasons why vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious diseases, or the lack of a prize crew, they may be appraised and sold; and if this cannot be done they may be destroyed. The imminent danger of recapture would justify destruction if there was no doubt that the vessel was a good prize. But in all such cases all the papers and other testimony should be sent to the prize court in order that a decree may be duly entered."<sup>2</sup>

Nothing is said in regard to the obligation of the captor to provide for the safety of all persons on board before destroying the vessel, but it may be assumed that it was not the intention

<sup>1</sup> Cf. on this point Hall, *op. cit.*, 459; Bentwich, *Law of Private Property in War on Land and Sea*, p. 94; Lawrence, *op. cit.*, p. 483, and Risley, *Law of War*, p. 149. Semmes, in defending the right to destroy without adjudication, remarked that "the enemy has no right to adjudication at all. Courts of admiralty are not established for him. He has and can have no standing in such courts. He cannot even enter an appearance there, either in person, or by attorney; and if he could, he would have nothing to show, for his very status as an enemy would be sufficient ground for condemning all the property he might claim. It is only neutrals who can claim adjudication, and it is for their benefit alone that courts of admiralty have been established." *Service Afloat*, p. 387.

<sup>2</sup> This is the identical language of article 50 of the United States *Naval Code* of 1900.



of the American government to authorize destruction of merchant ships in disregard of this humane and long-established rule. The British *Manual of Naval Prize Law* of 1888 (article 303) authorizes destruction of enemy vessels which are unseaworthy or if the commander is unable to spare a prize crew, where there is clear proof that the vessel belongs to the enemy, but in such cases the commander is required to remove the crew and papers and, if possible, the cargo. The regulations issued by the Japanese government at the outbreak of the war with China in 1894 authorized the destruction of enemy vessels that were unfit to be sent to a port, but only after the commander had taken off the crew and papers and, if possible, the cargo.<sup>1</sup> The Japanese regulations of 1904 went further and authorized the destruction of enemy vessels that were unseaworthy, when there was danger of recapture, and when a prize crew could not be spared without endangering the safety of the captor's vessel. But it was added, "before destroying or disposing of the vessel, the commander shall transship all persons on board and as far as possible, the cargo also, and shall preserve the ship's papers." The Russian regulations of 1901 authorized a more general destruction, but only after the removal of the crew and the papers and, as far as possible, the cargo.<sup>2</sup> It is clear that neither the authorities nor the prize regulations ever intended to sanction the general destruction of enemy merchant vessels, but that they limited it to exceptional cases, such as involved military necessity. This view was affirmed by the Institute of International Law in 1882, and by the governments of Great Britain, France, and Germany at the London Naval Conference; it was also the view taken by the German government with respect to the destruction of the *Ludwig* and *Vorwärts* in 1871. The German prize code (article 112), however, permits destruction whenever it is "inappropriate or unsafe" to take the vessel in, and German practice during the late war was in accord with this view.

<sup>1</sup> Takahashi, *International Law during the Chino-Japanese War*, p. 183.

<sup>2</sup> For a summary of the prize regulations of various States so far as they relate to destruction of enemy vessels, cf. *International Law Situations*, 1905, pp. 64-67; 1907, pp. 76-80. Cf. also Moore's *Digest*, Vol. VIII, pp. 518-519, and Sir F. E. Smith, *The Destruction of Merchant Ships under International Law*, pp. 38 ff. For other cases than those mentioned above in which the right of destruction is claimed, cf. Wehberg, *Capture in War on Land and Sea*, pp. 94-95.

§ 236. **Duty of Captor to Provide for Safety of Crew and Passengers.** The provisions of the regulations referred to above are fairly typical and indicate the general view. In most of them the obligation of the captor to provide for the safety of the passengers and crew before destroying the vessel is expressly affirmed; where it is not, it may be assumed that the omission was due either to inadvertence or to the feeling that it was unnecessary to require in express terms the performance of a duty demanded by every consideration of common humanity. This duty seems to be regarded by most writers who have considered the subject as one so imperative as not to need express affirmation. Professor Holland summarizes the opinions of Lord Stowell on this point as follows: "An enemy ship *after her crew has been placed in safety* may be destroyed."<sup>1</sup> Bentwich remarks that "In all cases where enemy ships are destroyed, all persons on board and all documents essential in elucidating the matter in the prize court are previously to be taken from the ship."<sup>2</sup> "If an enemy's ship and cargo are destroyed under some necessity," says Atherley-Jones, "care must be exercised in taking out all the persons on board together with their baggage."<sup>3</sup> The contrary view is not expressed by any writer so far as I am aware. The Hague convention of 1907 respecting the status of enemy merchant ships at the outbreak of hostilities (article 3), in authorizing the destruction of enemy ships (subject to indemnity) which had left their port of departure before the commencement of the war, conditioned the exercise of the right upon provision being made for the safety of the persons on board as well as the preservation of the papers.<sup>4</sup> Likewise the Declaration of London (article 50), in sanctioning the

<sup>1</sup> Letter to the *London Times*, August 1, 1904. Compare also the report of the Committee of English jurists referred to above, *Pubs. of the Grotius Society*, Vol. IV, p. xxxvi.

<sup>2</sup> *War and the Private Citizen*, p. 68. Cf. also his *The Declaration of London*, p. 98. "The generally observed rule in regard to the destruction of an enemy's vessel is 'an enemy ship can be destroyed only after her crew has been placed in safety.'" (*International Law Situations*, 1905, p. 73.) "Passengers and equipage," says Dupuis (*Droit de la Guerre Maritime*, p. 369), "must before destruction of the ship be put aboard the captor vessel." An enemy merchant vessel may be destroyed, said the French prize council in a recent case, after the commander has taken aboard the passengers and crew, if destruction is regarded as justifiable on grounds of military necessity. See the case of the *Sélimié*, 23 *Rev. Gén., jurisprudence*, p. 90; also the case of the *Mulahat*, *ibid.* p. 120.

<sup>3</sup> *Commerce in War*, p. 529.

<sup>4</sup> Cf. the remarks of Higgins, *The Hague Peace Conferences*, p. 305.

destruction of neutral vessels in certain contingencies, declares that "before the vessel is destroyed all persons on board must be placed in safety." Speaking of the obligation imposed on captors by this article, Bentwich<sup>1</sup> remarks that in the future the captor will have to provide for the reception of the crew, and possibly also the passengers, of the prize which he destroys, either on his own ship, where there is little room to spare, or in some vessel of his own or of a neutral State which he can induce to receive them. It is probable, therefore, he adds, that cruisers in the future will refrain from sinking their larger and more important prizes, such as ocean liners, both because they cannot accommodate their crews and passengers. and because they would thus sacrifice a valuable asset to their country and might involve it in large claims for damages. In the memorandum submitted by the German delegation to the International Naval Conference the view was expressed that ships and cargoes captured should be taken to the seat of a prize court in order that the capture could be adjudicated, but that in exceptional cases ships or goods might be sunk or otherwise destroyed if the taking of them in compromised the safety of the captor's vessel or the success of his operations. It added however, that before destroying the ship the safety of its *équipage* and papers must be provided for, as well as all other *pièces* which were deemed essential to the determination of the validity of the capture.<sup>2</sup> The German delegation gave its approval to article 50 of the Declaration of London, which definitely imposes this obligation upon captors in the cases in which it authorized the destruction of enemy vessels, and the German government put the Declaration into force at the beginning of the late war, with this provision unaltered. Moreover, section 116 of the German prize code as in force July 1, 1915, declares that "before proceeding to a destruction of the vessel, the safety of all persons on board and so far as possible their effects is to be provided for, and all the ship's papers and other evidentiary material which is of value for the formation of the judgment of the prize court are to be taken over by the commander."<sup>3</sup>

<sup>1</sup> *Declaration of London*, p. 98.

<sup>2</sup> *Proceedings of the International Naval Conference*, House of Commons Sessional Papers, Vol. 54, Misc. No. 5 (1909), p. 99.

<sup>3</sup> Huberich and King, *The Prize Code of the German Empire*, p. 68.

There was a difference of opinion at the Conference regarding the circumstances under which merchant vessels might be destroyed, but no voice was raised against the rule in respect to the obligation of the captor to provide for the safety of all persons on board. Had a proposal been made to dispense with this obligation in cases where the captor did not have adequate facilities and to allow him to destroy the crew and passengers with the ship, it is not probable that the proposal would have received a single vote in its favor.

§ 237. **The Practice in Previous Wars.** It is clear from this review of the authorities, the prize court decisions, and the provisions of international conventions respecting the destruction of enemy ships, that the obligation of the captor to provide for the safety of the passengers and crews is a thoroughly established rule of international law. In practice, this obligation has been generally respected by naval commanders in the wars of the past. During the American Revolution, John Paul Jones apparently always removed persons on board before burning his prizes, and when he was unable to do so, the ship was released.<sup>1</sup> This also seems to have been done by naval commanders during the war of 1812.<sup>2</sup> Even Semmes, who was variously described as a "freebooter," "corsair," and "pirate," never destroyed an enemy vessel without taking off the crew and passengers. In one case he released a valuable prize (the *Ariel*) because he had no accommodations on his own ship for the five hundred women and children who were aboard the captured vessel.<sup>3</sup> Describing his treatment of his numerous captives, he says, "We were making war upon the enemy's commerce, not upon his unarmed

<sup>1</sup> Cf. Allen, *Naval History of the American Revolution*, Vol. I, pp. 121, 124.

<sup>2</sup> Thus we read in the decision of the admiralty court in the case of the *Felicity* (2 Dodson, 383) that "the captain and the crew with their baggage were removed on board the cruiser and the *Felicity* was destroyed."

<sup>3</sup> "I was very anxious to destroy this ship," he says, "as she belonged to a Mr. Vanderbilt, of New York, an old steam boat captain who had amassed a large fortune in trade and was a bitter enemy of the South. Lucrative contracts during the war had greatly enhanced his gains, and he had ambitiously made a present of one of his steamers to the Federal government to pursue 'rebel pirates.' Failing to overhaul another ship of the enemy in the few days that I had at my disposal, I released the *Ariel* . . . and sent her and her large number of passengers on their way rejoicing." *Service Afloat*, p. 535. When he destroyed the *Hatteras*, a warship, "every living being in it," he says, "was safely conveyed to the *Alabama*."

seamen. It gave me as much pleasure to treat these with humanity as it did to destroy his ships."<sup>1</sup>

During the Russo-Japanese war some indignation was aroused in Japan over the report that the Russian Vladivostok squadron had sunk a number of Japanese vessels (notably the *Nakonoura Maru*, the *Goyo Maru*, the *Haginoura Maru*, and the *Kinshiu Maru*) with all persons on board; but the first reports proved untrue, and it turned out that the crews had been taken off and saved by the captors.<sup>2</sup> During the recent war this procedure seems to have been followed by the German cruisers whenever they made captures, for we are told that the captains of the *Emden*, the *Karlsruhe*, and the *Eitel Friedrich* were careful to save the crews and passengers, and that whenever they could not, for lack of facilities, they allowed the ship to go. The captain of the *Emden*, in particular, took off hundreds of men, women, and children from the ships that he sank. In one case he is reported to have released a British merchantman with a cargo valued at a million dollars because his ship was so crowded that he could not provide accommodations for the crew.<sup>3</sup> British naval commanders pursued the same policy. The secretary of the British admiralty stated on May 18, 1916, that while the English had destroyed or captured 314,465 tons of German shipping, so far as known no enemy or neutral subject had been killed in connection therewith.

§ 238. German Procedure during the Recent War. In former wars the sinking of enemy vessels was usually unaccompanied by the drowning of the crews and passengers. The destruction was wrought by a battle ship or cruiser, which navigated on the surface of the ocean. The customary procedure

<sup>1</sup> *Service Afloat*, p. 131. Mr. John A. Bolles, solicitor of the United States navy during the Civil war, bears testimony to the truth of this statement. In an article in the *Atlantic Monthly*, Vol. 30, p. 150 (1872), entitled, "Why Semmes of the *Alabama* was not Tried," Mr. Bolles states that he examined all the charges of cruelty brought against him and that "in not a solitary instance was there furnished a particle of proof that the 'pirate Semmes,' as many of my correspondents called him, had ever maltreated his captives or subjected them to needless or unavoidable hardships or deprivations." Mr. Bolles relates that in one case it was charged that Semmes had burned a ship with all persons on board; but upon investigation he was satisfied that the charge was without foundation. Cf. also Marvin, *History of the American Merchant Marine*, p. 327.

<sup>2</sup> Lawrence, *War and Neutrality in the Far East*, p. 40.

<sup>3</sup> Cf. his own story in his book *The Emden*, by Kapitän-Leutnant von Mücke (1917).

was to fire an unshotted gun (the *coup d'assurance*) as a signal to the vessel to heave to. An officer then went aboard to verify the ship's papers and to determine its nationality. If its enemy character was established, and there were controlling reasons why it should not be sent in, the officer took possession of its papers, all persons on board were removed and put aboard the capturing vessel, after which the prize was sunk or burned.<sup>1</sup> But the procedure of destruction practised by the commanders of the German submarines during the recent war differed widely from the older and more humane practice described above. These craft, like

"An assassin that lurks in the sea weed green  
And hides from the light of the sky,  
Like wolf ships that wait in the shadows of night,"

approached enemy vessels usually under water; in many instances they gave no warning at all before discharging their torpedoes, and in other cases the time allowed the crew and passengers to man the life-boats and leave the ship was insufficient. Apparently in few cases was any effort made by the commander of the submarines to take off the persons on board. Obviously such efforts would have been futile, for submarine craft have no facilities for taking care of the crews and passengers of ships which they destroy. Consequently, if they sink the ship, they must either destroy those on board or allow them sufficient time to save themselves by means of the life-boats. The latter alternative, the Germans alleged, was not always possible without exposing the submarine to destruction by an enemy war ship which might be summoned by wireless or by signals, or by being rammed and sunk by the ship which it sought to destroy. Moreover, owing to the relatively slow speed of submarines, notice of an intention to attack would in many cases have afforded the ship an opportunity to escape. The only sure means of destroying it, therefore, was to torpedo it without warning or after a very brief notice, and this was the general practice followed by German submarine commanders.

§ 239. *Its Unlawfulness.* Is such a procedure in conformity with the recognized rules of international law? It is difficult

<sup>1</sup> For descriptions of the usual formalities observed in capturing or destroying prizes, cf. Atherley-Jones, *Commerce in War*, ch. VIII, and Wehberg, *Capture in War on Land and Sea*, ch. VII.



to see how the question can be answered in the affirmative. The plea of overpowering military necessity, which is the basis of the German distinction between *Kriegsraison* and *Kriegsmanier*, cannot be admitted in this age as a justification for the deliberate killing of non-combatant enemy subjects and neutrals on a merchant ship pursuing a lawful voyage on the high seas.

"A captor," says Lawrence, "has no right to destroy an enemy merchantman unless its summons to surrender is disregarded, or its search resisted, or an attempt made to recapture the vessel after surrender. It may then use force to attain its proper end of capture, and if incidentally the ship is sunk, her crew have only themselves to thank. But to send helpless mariners to their death without giving them an opportunity to surrender would be an act of cruel and lawless violence."<sup>1</sup>

"The law and custom of nations in regard to attacks on commerce," said Sir Edward Grey in his note of March 1, 1915, to the American government, "have always presumed that the first duty of the captor of a merchant vessel is to bring it before a prize court where it may be tried, where the regularity of the capture may be challenged, and where neutrals may recover their cargoes."

"The sinking of prizes is in itself a questionable act to be resorted to only in extraordinary circumstances and after provision has been made for the safety of all the crew and passengers, if there are passengers on board. The responsibility for discriminating between neutral and enemy vessels, and between neutral and enemy cargo, obviously rests with the attacking ship, whose duty it is to verify the status and character of the vessel and cargo and to preserve all papers before sinking or even capturing it. So also is the humane duty of providing for the safety of the crews of merchant vessels, whether neutral or enemy, an obligation upon every belligerent."

" . . . A German submarine, however, fulfils none of these obligations; she enjoys no local command of the waters in which she operates; she does not take her captures within the jurisdiction of a prize court; she carries no prize crew which she can put on board a prize; she uses no effective means of discriminating between a neutral and an enemy vessel; she does not receive on board for safety the crew and passengers of the vessel she sinks; her methods of warfare are therefore entirely outside the scope of any of the international instruments regulating operations against commerce in time of war."

President Wilson in his *Lusitania* note of May 13, 1915, to the German government called its attention to the "practical

<sup>1</sup> *War and Neutrality in the Far East*, p. 40. A cruiser, says Kleen (*Les Lois et les Usages de la Neutralité*, Vol. II, p. 531), which does not have at its disposition the means or facilities for complying with all the conditions of a legal seizure is not a competent captor.



impossibility of employing submarines in the destruction of commerce without disregarding those rules of fairness, reason, justice and humanity which all modern opinion regards as imperative," because submarines were not fitted for taking prizes and were not equipped with accommodations for saving the crews and passengers. Nearly a year later, on April 19, 1916, the President again said that by reason of the very character of the submarine and its methods of attack its employment was "incompatible with the principles of humanity, the long-established and incontrovertible rights of neutrals and the sacred immunities of non-combatants."<sup>1</sup>

§ 240. **German Arguments.** There is a clear distinction between the right of a belligerent to destroy an enemy merchant vessel and the right to destroy the lives of the unoffending non-combatant enemy subjects and neutrals which it may have on board. The former, subject to certain conditions, is lawful; the latter is never justifiable.<sup>2</sup> The Germans ignored this distinction and attempted to justify the destruction of passengers and crews on the ground that submarines have no facilities for taking them off. On this point Dr. Dernburg, in a statement furnished the press shortly after the sinking of the *Lusitania*, said:

"It has been the custom heretofore to take off passengers and crew and tow the ship into port. But a submarine, say 150 feet long, cannot do it. It has no accommodations for either passengers or crew."

This argument amounts to nothing less than a claim of special immunity for submarines because of their peculiar construction and consequent weakness. Since it is impossible to employ them in conformity with the established rules governing prize destruction by means of cruisers, they are entitled to an exemp-

<sup>1</sup> In a note of January 18, 1916, to the German government Secretary Lansing appears to have departed from the view laid down in the above-mentioned note that submarines could not be lawfully employed at all against commerce, but should be used exclusively against war vessels. In admitting that submarines might under certain circumstances be lawfully used against enemy commerce the administration weakened somewhat the strength of the American case. Cf. Rogers, *America's Case against Germany*, p. 69. Cf. also the opinion of Professor Minor that no submarine warfare against commerce should be allowed. *Procs. of the American Society of International Law*, 1916, pp. 55, 59. Cf. also the remarks of Chandler P. Anderson, *The Status of Armed Merchantmen*, *ibid.*, 1917, p. 13.

<sup>2</sup> Fauchille justly remarks that prizes may be destroyed, but that this means only the ship and cargo and not the persons on board. 25 *Rev. Gén.* p. 75.

tion from the obligation which these rules impose upon naval commanders. It amounts to a contention that a prohibition ceases to be binding whenever a new instrument for doing the forbidden act is invented or discovered; that if an immediate belligerent interest may be subserved by the employment of an instrument which cannot be used in conformity with the existing rule of law, the rule may be disregarded and the interest allowed to prevail. In fact, however, the Germans contended that the rule regarding the duty of naval commanders to provide for the safety of the crews and passengers found on merchant vessels was never intended to apply to the commanders of submarines. This rule, they argued, originated at a time when submarines had scarcely been dreamed of; cruisers and battle ships were the principal craft employed for destroying prizes, and they possessed facilities for removing crews and passengers and for providing for their safety. So far as they were concerned, the rule was still binding upon their commanders, and in fact it had been observed by the German commanders of such vessels before sinking their prizes. It involved no hardship to a belligerent to observe the rule in the conduct of cruiser warfare, but if extended to submarine warfare, it would render impossible the employment of the only naval weapon which Germany had left. "New situations," said Professor Fleishmann of the University of Königsberg, "necessitate new rules," and the submarine, being a new weapon, is not obliged to conform to rules adopted for the conduct of cruisers and battle ships.<sup>1</sup> Professor Zitelmann of the University of Bonn elaborated this argument. "Legal rules," he said, "which are inapplicable to new conditions must give way to new regulations. *Cessante ratione legis cessat lex ipsa*. Technical science and policy may create new conditions which of necessity destroy the framework of the old

<sup>1</sup> Cf. his article entitled *Der Lusitania-Fall* in the *Zeitschrift für Völkerrecht*, Bd. IX, pp. 159 ff. Cf. also an article by Professor Hermann Rehm in the same periodical, pp. 20 ff. Professor Rehm, however, admits that the submarine is not relieved from the obligation to obey the existing rules of international law. He even asserts that the law of war does not have to accommodate itself to new methods and instruments; on the contrary, they must conform to the law. He argues, however, that the rules of the Hague convention were not binding because not ratified by all the belligerents. The old rules remained in force, but they allow a belligerent to employ all means of war which do not violate military honor. The essence of submarine warfare, he added, is attack by surprise, and this is entirely permissible. Cf. also the article by Professor Triepel, *ibid.*, pp. 232 ff.

rules of international law." "Who," he asks, "would have thought at the time the old rules governing maritime warfare were formed, of the possibilities of submarine warfare? Had the use of submarines been anticipated special rules governing their employment would have been devised." <sup>1</sup>

Professor Paul Heilborn of Breslau in an article entitled *Der Verschärfte See Krieg*, published in the *Zeitschrift für Völkerrecht*,<sup>2</sup> made a belabored attempt to justify the German methods of submarine warfare on the following grounds: (1) as a legitimate measure of reprisal against Great Britain for alleged violations of the laws of war; (2) on the ground that the law is not eternal and unchangeable and must give way to the introduction of new methods and instruments; (3) on the ground that practice, international law, and the German prize regulations allow a captor to destroy neutral as well as enemy merchant vessels without the necessity of taking them into a prize court, and (4) the risk of danger to the destroying submarine releases its commander from the obligation to provide for the safety of crews and passengers, whenever he has reason to believe that such danger is imminent.

The German decree of February 4, 1915, he said, announced that the safety of passengers and crews would be provided *whenever possible*. The captor, however, he added, must not expose himself to danger in providing such safety, and the British government, having directed its merchantmen to ram and sink German submarines, the latter were not bound to incur the risk of being themselves destroyed, whenever an attempt to save crews and passengers would expose them to such danger.<sup>3</sup>

In a memorandum submitted to the department of state by Count Bernstorff on March 8, 1916, he likewise put forward the argument that the submarine is "a new weapon, the use of which had never been regulated by international law," from which the inadmissible conclusion was drawn that in using this weapon Germany "could not and did not violate any existing law." Chancellor Michaelis, in his address before the *Reichstag* on July 19, 1917, defended the legality of the submarine as an instrument of warfare and asserted that the methods adopted

<sup>1</sup> "The War and International Law" in *Deutschland und der Weltkrieg* (English trans. under the title *Modern Germany*, 1916), p. 609.

<sup>2</sup> 1915, pp. 44 ff.     <sup>3</sup> *Ibid.*, pp. 52, 55.

by Germany were in entire accord with the rules of international law. Among other things he said:

"And what is true of the war itself is true also of our weapons, particularly the submarine weapon. We deny the accusation that submarine warfare is contrary to international law and violates the rights of humanity. England forced this weapon into our hands. Through her illegal blockade she prevented neutral trade with Germany and proclaimed a war of starvation."<sup>1</sup>

Herr Zimmermann, under-secretary of state for foreign affairs, thus justified German submarine warfare to a staff correspondent of the *New York Times* on November 15, 1916:

"Our cruiser warfare with submarines is being conducted in strict compliance with the German prize regulations, which correspond to the international rules laid down and agreed to in the Declaration of London, and this despite the fact that England has refused to be bound by the London Declaration. Germany accordingly will continue to exercise her perfect good right to take these defensive measures."

Finally, admitting that the rule in respect to making provision for the safety of crews and passengers applied to submarine warfare, Germany was, according to German logic, justified in disregarding it as a measure of just reprisal against Great Britain for her attempt to starve the German people by means of an illegal blockade<sup>2</sup> and for herself disregarding the Declaration of London in certain particulars.

§ 241. **The German Arguments Analyzed.** Not one of the arguments put forward by the Germans in defence of their methods of submarine warfare, if judged on the basis of the law, the practice of the past, or the principles of humanity, is convincing. Their claim to a special immunity for the submarine, since because of its construction it cannot be used in

<sup>1</sup> Some American apologists of Germany's submarine methods defended this view. Cf. Burgess, *America's Relations to the War*, p. 16, and an article by Major Bigelow in the *New York Times*, September 10, 1916.

<sup>2</sup> This argument is elaborated by Dr. Hans Steimuth in his book *England und der U-Boot Krieg* (Stuttgart, 1916). The Imperial chancellor also defended the methods of submarine warfare on the same ground. Cf. his interview in the Associated Press despatches of January 25, 1916, where he says: "It should not be forgotten that in this war Great Britain set out to starve over 65,000,000 people directly by cutting off their food, indirectly by closing the arteries of their commerce. In attempting this it did not refrain from destroying a considerable part of the trade of neutral nations. Now it is beginning to dawn on Great Britain that it cannot force us to submission by these methods."

conformity with the law, was, although the most relied upon of all their arguments, the weakest. It ignored the fundamental fact that the rule of law in respect to providing for the safety of crews and passengers on merchant vessels was founded upon considerations of humanity and was intended to govern prize destruction by any and all types and varieties of naval craft. To argue that a cruiser cannot be employed for sinking merchant vessels without observing the law of humanity, but that a submarine may be thus used is grossly illogical. The rule referred to was adopted for the protection of innocent non-combatants, not for the benefit of belligerents, and it cannot be admitted that the invention of new instruments repeals or modifies the rule. The use of the instrument must be adjusted to the requirements of the law of nations and of humanity and not they to the instrument. The German argument was in line with their general theory that "whatever is effective and whatever tends to shorten a war is legitimate," and consequently any rule of law which interferes with the attainment of the object of the war may be disregarded, especially if the conditions existing at the time the rule was made have undergone change. In the final analysis it amounted to the claim that a single belligerent alone may change the law of the sea to meet his own immediate necessities. This was an extraordinary contention. Heretofore the principle has never been contested that a rule of international law ceases to be binding in consequence of changed conditions, only through express international agreement or tacit assent on the part of the whole body of States.<sup>1</sup>

The obligation of belligerents to spare the lives of unoffending non-combatants (to say nothing of the lives of neutrals) is one of the oldest rules of war, and hitherto it has been one of universal recognition. The obligation is as binding upon

<sup>1</sup> Cf. the observations of the United States Supreme Court in the case of the *Scotia*, 14 Wall. 170 (1871), where it was said that the law of the sea is universal and cannot be changed by a single nation. Cf. also President Wilson in his letter to Senator Stone in March, 1916, where he said: "No nation, no group of nations, has the right while war is in progress to alter or disregard the principles which all nations have agreed upon in mitigation of the horrors and sufferings of war; and if the clear rights of American citizens should ever unhappily be abridged or denied by any such action, we should, it seems to me, have in honor no choice as to what our own course should be."

naval as upon military commanders, and it is as binding in portions of the sea that have been publicly proclaimed as war zones as anywhere else. The use of new implements of warfare, the employment of which renders impossible conformity to universally recognized rules of international law that are founded upon considerations of justice and humanity, cannot be admitted as lawful unless the world is prepared to abandon some of its most sacred and fundamental notions of justice.

It will readily be admitted that the introduction of the submarine may necessitate certain modifications of maritime law, but it is not to be assumed that any changes will be introduced which will alter what the President of the United States called "those rules of fairness, reason, justice and humanity which all modern opinion regards as imperative." These rules are eternal and universal and can never be broken down by scientific inventions. If Professor Zitelmann's assertion that had the use of the submarines been anticipated, special rules governing their employment would have been devised, was intended to imply that submarine commanders would have been relieved of the obligation imposed upon the commanders of cruisers to provide for the safety of crews and passengers, it may be confidently asserted that his assumption was entirely without justification. Writers, indeed, are by no means lacking who long before the recent war took the position that the use of torpedoes for sinking merchant vessels ought not to be recognized as lawful. One of these was M. Desjardins, who affirmed that their employment should be confined exclusively against war ships.<sup>1</sup> Rivier<sup>2</sup> expressed the same opinion, and so did Martens,<sup>3</sup> Pradier-Fodéré,<sup>4</sup> and others.<sup>5</sup>

One of the objections raised at the Second Hague Conference

<sup>1</sup> *Les Torpilles et le Droit des Gens* in the *Revue de Droit Maritime* (1886), Vol. II, p. 75.

<sup>2</sup> *Principes du Droit des Gens*, Vol. II, p. 337.

<sup>3</sup> *Traité de Droit International*, Vol. III, § 110.

<sup>4</sup> *Traité de Droit Int.*, § 3116.

<sup>5</sup> "I can hardly believe," says M. Du Pin de Saint-André, "that European nations are barbarous enough and so destitute of reason as to send against ships of commerce torpedoes which can only sink them, instead of intercepting them by cruisers which are able to take them in, to the great advantage of the captors and their nation." *La Question des Torpilleurs*, in the *Revue des Deux Mondes*, Vol. LXXV (1886), p. 880. Cf. also J. Imbart de Latour, *La Mer Territoriale*, pp. 322-323.



against the right to sink merchant vessels was the lack of adequate facilities on modern war ships for taking care of the persons on board the ships destroyed. This objection was pointed out with particular emphasis by one of the American delegates, General Davis, who also called attention to the fact that neutral persons and non-combatants, if put aboard war ships, would be exposed to the dangers of battle in a much greater degree than when fleets were constructed of wood and driven by wind. In all the discussions on the subject it was assumed that the right of destruction was conditioned upon the obligation of the captor to provide for the safety of the crews and passengers, and never once was it intimated that inability to make such provision constituted a sufficient justification for disregarding the obligation.

§ 242. **Setting Crews and Passengers Adrift in Small Boats.** The Germans claim that in many instances in which their submarines destroyed merchant vessels they saved the persons on board *whenever possible*, and that, except when it involved danger to the destroying submarine, sufficient time was allowed them to take to the life-boats and save themselves. But the fact is, in many instances no warning at all was given, and therefore no time was allowed for the lowering of the life-boats; and in numerous cases where warning was given the time allowed was entirely insufficient.<sup>1</sup> Even when the time allowed to leave the ship was sufficient, it frequently amounted only to a technical compliance with the rule requiring captors to provide for the safety of the persons, for they were often set adrift in small boats hundreds of miles from land in midwinter, without food or drinking water, and left to drift in the open sea for days and weeks, sometimes to die of thirst, starvation, or exposure to cold or to be washed overboard by rough seas and drowned while struggling to save themselves. The German government itself readily admitted that this procedure was no compliance with the spirit of the law, and assurances were given the government of the United States that the crews and passengers of ships sunk by German submarines would not be exposed to danger in this fashion. This pledge is found in a note of November 29, 1915, addressed by Herr von Jagow to the American

<sup>1</sup> Cf. some instances cited by United States Consul Frost at Queenstown London weekly *Times*, December 7, 1917.



ambassador at Berlin, relative to the sinking of the *William P. Frye*, in which the German minister of foreign affairs said:

"In this the German government quite shares the view of the American government that all possible care must be taken for the security of the crew and passengers of a vessel to be sunk. Consequently, the persons found on board of a vessel may not be ordered into her life-boats except when the general conditions, that is to say, the weather, the condition of the sea, and the neighborhood of the coasts, afford absolute certainty that the boats will reach the nearest port."<sup>1</sup>

Subsequent to this communication, however, scores if not hundreds of well-authenticated cases occurred in which crews and passengers were set adrift in small boats far from land, not infrequently in rough weather, and left to shift for themselves. Mr. Wesley Frost, American consul at Queenstown during the first three years of the war, who heard the stories of many of the victims, has given numerous instances with the details.<sup>2</sup> It is hard to see how any humane voice can ever be lifted in defence of such methods of warfare. Yet the *Kölnische Volkszeitung* of July 29, 1916, defended the German submarine commanders against criticism and pronounced them "honorable and chivalrous combatants."

§ 243. **Other Submarine Atrocities.** Many charges were also made against commanders of German submarines of firing upon the crews and passengers while they were endeavoring to

<sup>1</sup> *European War*, No. 3, p. 316.

<sup>2</sup> See his book *German Submarine Warfare* (New York, 1918). Cf. also the book of Alfred Noyes, entitled *Open Boats* (New York, 1917), Kipling, *Sea Warfare* (New York, 1917) and Bateman, *U-Boat Deviltry* (London, 1918). The following are a few typical instances from a large number which I have gathered from various sources.

In the spring of 1916 the crew of the *Galgate* was left in small boats 150 miles from land, where they were exposed to intense cold and the risk of heavy seas for several days. In January, 1917, the crew of the *Artist* were set adrift in small boats forty-eight miles from land. Three days later sixteen of them were picked up in weather of such severity that seven of the original twenty-three had already died of wounds and exposure. In the course of the attack on the *Huntsfall* twelve of the crew were killed; the survivors were set adrift in small boats 195 miles from the nearest land and were rescued after many hours of exposure to rigorous weather. After the sinking of the *Lumeta* without warning the survivors were placed in open boats in midwinter, one of which was not picked up until five days later. The *Cottingham* was torpedoed on December 26, 1916, and the survivors were put into life-boats and left to shift for themselves. The washing ashore of a life-boat bearing the name of *Cottingham* some weeks later furnished the only clew to their fate.

take to the life-boats and even of attacking their rescuers; of refusing to tow life-boats to places of safety; of placing survivors on the deck of the submarine and then submerging, leaving them to drown, and similar unbelievable atrocities. Consul Frost states that the last-mentioned atrocity was repeatedly committed by German submarines.<sup>1</sup> The most shocking instance of the kind was the deliberate drowning of thirty-eight neutrals of the crew of the British steamer *Belgian Prince* on July 31, 1917. After the vessel had been torpedoed, the crew, which had taken to the life-boats, were ordered to the upper deck of the submarine, where they were systematically robbed of their money and other effects; the life-boats were then smashed with axes, and the life belts were taken from the crew and thrown overboard. This done, the hatches of the submarine were closed and it submerged, 200 miles from land, leaving forty-one members of the crew standing on the deck. Of these thirty-eight were drowned; three who had managed to conceal their life belts were picked up after having been in the water for eleven hours.<sup>2</sup> No defence or explanation of the atrocious act appears to have been made by the German government, although it was widely discussed by the press in Europe and America. It is hard to see what defence could be made. The fact that the survivors were in the water for eleven hours before they were rescued would seem to negative the possible contention that the presence of an enemy patrol made the submerging of the submarine a necessity.

Such were the methods of German submarine warfare. They were as much a violation of the law of nations as was the conduct of the ships of the Barbary powers of Africa in the eighteenth century in preying upon commerce in the Mediterranean, which was eventually put an end to by the joint coöperation of Europe and America. Technically, the German submarines

<sup>1</sup> Mr. Frost refers to the case of the *Cairnhill* which was torpedoed, after which nineteen of the men who had succeeded in taking to one of the life-boats were placed on the deck of the submarine, which instantly submerged, leaving the victims floundering in the open sea 150 miles from land. See his despatch to the department of state, *New York Times*, April 23, 1917.

<sup>2</sup> This account is based on the testimony of the three survivors. The survivors were the chief engineer and two members of the crew, one of whom was an American citizen, William Snell. The depositions as to the circumstances under which the crew of the *Belgian Prince* were murdered were printed and issued in pamphlet form by the United States Committee on Public Information.

were not pirate ships, because their commanders bore commissions issued by a lawfully recognized belligerent power; but it has been argued that they were pirates within the meaning of the old definition, which defined pirates as *hostes humani generis*.<sup>1</sup> Naturally few or no authorities outside Germany and Austria arose to defend such methods of warfare, and even in these countries they found adversaries.<sup>2</sup>

<sup>1</sup> Cf. Mr. A. P. Higgins' *Defensively Armed Merchant Ships and Submarine Warfare*, pp. 25-26, and Mr. E. P. Wheeler in *Proceedings of the American Society of International Law*, 1916, p. 66. Cf. also the opinion of a Dutch writer quoted by Mr. J. C. Van der Veer in the *Spectator* of March 4, 1916.

<sup>2</sup> For example, Dr. Joseph Redlich, a distinguished Austrian jurist and member of Parliament, is reported to have criticised strongly the German policy of ruthless submarine warfare. A group of prominent German socialist leaders in the *Reichstag* in September, 1916, severely criticised the government's submarine policy.

## CHAPTER XVI

### *THE STATUS OF DEFENSIVELY ARMED MERCHANT VESSELS*

§ 244. Early Questions Raised; § 245. British Representations as to Converted German Merchantmen; § 246. The Same as to the Right of Armed British Merchantmen to Enter Neutral Ports; § 247. The American Circular of September 19, 1914; § 248. The German Protest; § 249. The American Memorandum of March 26, 1916; § 250. Status of Armed Merchantmen on the High Seas; § 251. The German Decree of February 8, 1916; § 252. The British Reply to the German Charges; § 253. The German Charges Analyzed; § 254. The German Contention Regarding the Right of Merchant Vessels to Carry Armament; § 255. Practice of the Past; § 256. The Right Attacked by the Germans; § 257. Discussion by the Institute of International Law; § 258. Views of Dr. Schramm; § 259. Views of Professor Oppenheim; § 260. The German Argument Analyzed; § 261. Right of Unarmed Merchant Vessels to Resist Attack. Case of Captain Fryatt; § 262. German Defence of the Shooting of Captain Fryatt; § 263. The German Contention Analyzed; § 264. Nature of Captain Fryatt's Offence; § 265. Right of Armed Neutral Merchantmen to Resist Attack; § 266. The Arming of American Merchant Vessels in 1917; § 267. Defence of the American Policy; § 268. Legality of the American Policy Attacked.

§ 244. **Early Questions Raised.** A question which evoked widespread popular discussion as well as irritating diplomatic controversy during the recent war related to the status of merchant vessels, both of belligerent and of neutral nationality armed for defence against attack by German submarines. The question as to the status of defensively armed merchantmen of belligerent nationality was raised under two forms: (1) Whether they were entitled to the usual privileges accorded to ordinary trading vessels to enter neutral ports, or whether they were to be regarded in the same light as war ships and subjected to the customary restrictions imposed on such vessels; and (2) whether when they were encountered on the high seas by the cruisers or submarines of the enemy, they were to be treated as war vessels and therefore liable to be sunk without warning and without provision for the safety of their crews and passengers.

The first question was one which had to be determined by the governments of the neutral States into whose ports and

waters such vessels sought to enter. If their status was the same as that of ordinary trading vessels, they were entitled under the customary law of nations to enter and depart freely and to take on coal and other supplies without restriction. On the contrary, if they were to be assimilated to the status of war vessels, their privilege of coaling, making repairs, subsequent use of the port, and the like, were subject to well-established limitations.

§ 245. **British Representations as to Converted German Merchantmen.** On August 4, 1914, the day on which the war between Great Britain and Germany broke out, the British chargé d'affaires at Washington addressed a communication to the secretary of state calling his attention to the recognized duty of neutral governments to use due diligence to prohibit their citizens or subjects from building or fitting out vessels intended to be used for warlike purposes and to prevent the departure of such vessels from their jurisdiction. It was known, the communication added, that Germany claimed the right to convert her merchant vessels into armed ships on the high seas, and it was probable, therefore, that attempts would be made to equip and despatch merchantmen for such conversion from the ports of the United States. The chargé added further that "His Majesty's government will accordingly hold the United States government responsible for any damages to British trade or shipping, or injury to British interests, generally, which may be caused by such vessels having been equipped at or departing from United States ports."<sup>1</sup> In acknowledging the communication, the secretary of state declared that it did not seem appropriate to enter into any discussion as to what might or might not be the policy of Germany in respect to the conversion of her merchant ships into ships of war after they had left the ports of the United States. The assertion by Germany at the Second Hague Conference and at the London Naval Conference of the right of belligerents to convert merchant vessels into war ships on the high seas did not of itself indicate an intention to exercise the right, and therefore the government of the United States did not feel justified in assuming in its correspondence with foreign governments such an intention, in the absence of specific information to the con-

<sup>1</sup> Text in 9 *Amer. Jour. of Int. Law* (1915), Supp., pp. 222-223.

trary. The government would, however, carefully examine the facts and circumstances of any particular case which might be called to its attention.<sup>1</sup>

§ 246. **The Same as to the Right of Armed British Merchantmen to Enter Neutral Ports.** The question of the status of defensively armed merchantmen, as distinguished from merchantmen converted into war vessels, was raised during the first week of the war when the British chargé at Washington notified the department of state that a "certain number of British merchant vessels were armed"; the communication added, however, that this was a "precautionary measure, adopted solely for the purpose of defence, which, under existing rules of international law, is the right of all merchant vessels when attacked."<sup>2</sup> Since according to the British rule British merchant vessels could not be converted into war ships in any foreign port, such vessels, even if armed, were not liable to internment or expulsion by neutral governments. This liability, it was added, applied only to "actual and potential men of war." On the other hand, since the German government had consistently claimed the right of conversion on the high seas, German merchant vessels which were adapted for conversion on the high seas should be interned in the absence of binding assurances that no attempt would be made to so convert them. The responsibility for preventing this rested upon the government of the neutral State in whose ports they were found. Again, on August 25 the British ambassador at Washington informed the secretary of state that in view of the fact that a number of British armed merchantmen would shortly be visiting American ports, he wished to reiterate that the arming of such vessels was solely a precautionary measure adopted for the purpose of defence against attack from hostile

<sup>1</sup> Text, *ibid.*, pp. 225-227. At both of the conferences referred to above the governments of Germany and Austria-Hungary insisted on the right of conversion on the high seas. France and Russia, both allies of Great Britain in the recent war, likewise insisted on this right, but Great Britain at both conferences and Belgium at the Second Hague Conference opposed it. It thus happened that four of the maritime powers engaged in the late war had maintained the right of conversion on the high seas, while two of them had opposed it, and that the maritime powers at war with Germany and Austria-Hungary were evenly divided on the question. No agreement on the question was reached at either conference.

<sup>2</sup> Text of the communication, *ibid.*, pp. 223-224.

craft, and that he had been instructed by Sir Edward Grey to give assurances that British merchant vessels would never under any circumstances be used for purposes of attack; that they were merely peaceful traders armed only for defence and would never fire unless first fired upon.<sup>1</sup> The secretary of state acknowledged the receipt of this communication, but made no comment on it. On September 4 the British ambassador addressed another communication to the secretary of state informing him that he had at the request of the American government called the attention of the British government to the fact that two British merchant vessels, the *Adriatic* and the *Merrion*, were in the ports of the United States and that they carried guns; the former, four, and the latter, six. In calling

<sup>1</sup> Text, *ibid.*, p. 230. A somewhat similar communication was addressed to the government of Chili on June 18, 1915. The despatch stated that the "first of the merchant ships armed for self-defence will shortly leave England for Chilean ports. These vessels carry on a regular trade with the Argentine Republic, Brazil, Uruguay, the United States and Spain, and His Majesty's government assume that Chili will raise no objection to admitting them." "As your excellency is aware, according to the rules of international law now in force," the communication added, "all merchant ships have the right to defend themselves when attacked. Moreover, British merchant ships in foreign ports cannot be converted into war ships, since Great Britain does not recognize the right of any power to do so on the high seas. The government of His Britannic Majesty hold that the duty of neutral governments with regard to belligerent vessels is confined to war ships properly so called, and that consequently a neutral government has no right to intern British-owned vessels armed solely for self-defence, nor to require them to remove their guns before they put to sea." On July 7, 1915, the Chilean minister of foreign affairs stated that he had already notified the British government on March 15 that the government of Chili saw no objection to vessels having been reconverted from merchant vessels to naval auxiliaries being admitted to Chilean ports. The government was ready to apply the same rule to merchant vessels armed for defence. Chilean ports would therefore receive "merchant ships armed for self-defence, when their respective governments shall have previously communicated to ours the name of the vessel sailing under these conditions and when the itinerary, the muster roll, the list of passengers and cargo, as well as the accommodations and the equipment of the vessel shall prove that it is indeed a merchant ship and not designed to commit hostile acts nor to coöperate in the war operations of enemy fleets. If a merchant vessel shall arrive armed and this previous notice shall not have been given by its government, such vessel shall be considered and treated as suspect. If, contrary to their declarations, these vessels should engage in war operations against unarmed merchant ships, they would then be considered and treated as pirates, since the government of the country under whose flag they sail would, by not including them in its naval fleet, be considered as having formally declared them to be of an exclusively commercial character." Alvarez, *La Grande Guerre Européenne et la Neutralité du Chili*, pp. 258-259.



the attention of the British government to this fact, he added that the presence of these vessels in American ports was likely to raise difficult questions regarding American neutrality, notwithstanding the assurance given that the guns which the ships carried would be used only for defensive purposes in case of attack. He had, he said, received a reply from Sir Edward Grey to the effect that it was not regarded as in accord with neutrality and international law for a neutral government to detain such vessels, but in view of the fact that the United States government was detaining merchant vessels armed for *offensive* warfare and in order to avoid the difficult question as to the character and degree of armament which would justify detention, His Majesty's government had made arrangements for landing the guns of the *Merrion* and *Adriatic*, and they would be returned to England as cargo in some vessel, without mountings or ammunition.<sup>1</sup>

§ 247. **The American Circular of September 19, 1914.** The exact status of armed merchant vessels not having been fixed by international agreement, it was necessary for the government of the United States to adopt a rule of its own for the guidance of its port officials in determining the rights and privileges of such vessels in American ports. Accordingly on September 19, 1914, the department of state issued a circular on the subject, and on the same day a copy was communicated to the several belligerent governments concerned.<sup>2</sup> The circular undertook to distinguish between vessels armed solely for *defensive* purposes and those armed for purposes of *offence*, the former of which would not be regarded as ships of war while using American ports. It then proceeded to lay down the rule that the presence of armament and ammunition on board a merchant vessel would be regarded as creating a presumption that the armament was intended for offensive purposes. Nevertheless, this presumption could be overcome by the owners or agents by showing that the armament was intended solely for defence. Among the circumstances which would be taken into consideration in determining the question of intent were the number, caliber, character, size, and position of the guns; the quantity of ammunition carried, whether the vessel was

<sup>1</sup> Text of the communication, *ibid.*, p. 231.

<sup>2</sup> Text in Supp. to 9 *Amer. Jour. of Int. Law*, p. 121.

manned and officered by its usual crew and officers; whether the intention of the vessel was to clear for a port lying in its usual trade route; whether it took on fuel and other supplies sufficient only to carry it to its port of destination, etc.<sup>1</sup>

§ 248. **The German Protest.** Notwithstanding the rigor of these rules, which laid down the presumption that the presence of armament was evidence of hostile intent, the German government complained that they "wholly failed to comply with the principles of neutrality." In a memorandum of October 15, 1914, it charged that "the equipment of British merchant vessels with artillery was for the purpose of making armed resistance against German cruisers." "Resistance of this sort," it was added, "was contrary to international law, because in a military sense a merchant vessel is not permitted

<sup>1</sup> The views of the department of state as set forth in the circular of September 19, 1914, regarding the right of merchant vessels to carry guns for defensive purposes appear to have undergone a change for some reason during the course of the next year. In an informal and confidential letter to the British ambassador on January 18, 1916, the secretary of state ventured the opinion that belligerents should not be deprived of the proper use of submarines against enemy commerce and that a "slight modification of the precedents generally followed by nations prior to the introduction of submarines might be introduced which would appeal to the sense of justice and fairness of all the belligerents." Adverting to the former methods of procedure against enemy commerce, he went on to say that the invention of the submarine had altered the conditions under which international law had appeared to permit merchant vessels to carry armament for defence; moreover, pirates had been driven from the seas, and privateering had been abolished by international convention. Consequently, the presence of armament on a merchant vessel created the presumption that it was there for offensive purposes. It was, therefore, proposed that the belligerent governments should agree that submarines should adhere strictly to the rules of international law in respect to searching merchant vessels of belligerent nationality and of making provision for the safety of their passengers and crews before sinking them, and that such vessels should be prohibited from carrying any armament whatsoever. Text in *European War*, No. 3, pp. 162 ff. This circular was criticised in many quarters as a surrender of the principle asserted in the circular of September 19, 1914, and a virtual admission of the soundness of the German contention. Cf. the observations of Senator Lodge in the *Congressional Record* of February 18, 1916, who said that the secretary of state must have been perfectly aware that the arming of merchantmen for defensive purposes was not confined to defence against pirates and privateers. The proposal was strongly criticised by the press of England, and it found no favor with the governments of the Entente powers, which took the position that the voluntary surrender of the right of merchant vessels to carry arms for defence would amount to a change of the rule of international law and not merely a change in the method of applying the law. So long as German submarines continued to torpedo merchant vessels without warning, it was impossible to consider a proposal to deprive the latter of their only means of defence.

to defend itself against a war vessel." It was doubtful, therefore, whether armed merchant vessels should be admitted to neutral ports at all. In any event, they should not receive any better treatment than regular war ships and should be subjected to the rules governing the stay of such ships in neutral ports. So far as determining the warlike character of a ship, the distinction between defensive and offensive armament was irrelevant.<sup>1</sup>

In a note of November 7, 1914, the secretary of state declared that the American government felt obliged to dissent from this view.

"The practice of a majority of nations and the consensus of opinion by the leading authorities on international law, including many German writers," he said, "support the proposition that merchant vessels may arm for defence without losing their private character and that they may employ such armament against hostile attack without contravening the principles of international law. The purpose of armament on a merchant vessel is to be determined by various circumstances, among which are the number and position of the guns on the vessel, the quantity of ammunition and fuel, the number and sex of the passengers, the nature of the cargo, etc. Tested by evidence of this character the question as to whether armament on a merchant vessel is intended solely for defensive purposes may be readily answered and the neutral government should regulate its treatment of the vessel in accordance with the intended use of the armament. This government considers that in permitting a private vessel having a general cargo, a customary amount of fuel, an average crew, and passengers of both sexes on board, and carrying a small armament and a small amount of ammunition, to enjoy the hospitality of an American port as a merchant vessel it is in no way violating its duty as a neutral."

§ 249. The American Memorandum of March 26, 1916. The rules laid down in the circular of September 19, 1914, which were based on the assumption that it was possible to distinguish between the carrying of armament for defensive purposes and the carrying of armament for offensive purposes, that the mere presence of armament created a presumption that it was intended for purposes of offence, and that the number, size, and position of the guns and similar indicia were proper tests for determining the use to which they were intended, were superseded by new rules embodied in a memorandum of March 25, 1916.<sup>2</sup> So far as the status of armed merchant

<sup>1</sup> Text of the memorandum, *ibid.*, pp. 238-240.

<sup>2</sup> Text in *European War*, No. 3, pp. 188 ff.; also the *New York Times* of April 27, 1916. Mr. A. P. Higgins, criticising the proposition that the number and

vessels in neutral ports was concerned, the memorandum laid down the sounder and more logical rule that if a vessel carried a commission or orders issued by a belligerent government, directing it under penalty to conduct aggressive operations, or if it was conclusively shown to have conducted such operations, it should be regarded and treated as a war ship. On the other hand, if it carried no such commission or orders, it was entitled to the same hospitality in neutral ports that is accorded to unarmed merchantmen, regardless of the character and amount of its armament.<sup>1</sup> According to the new rule the

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position of the guns carried by a merchantman is a proper test for distinguishing between defensively and offensively armed vessels, remarks that "There was not, nor is there today, any ground for suggesting that while one or two guns placed in the stern of a ship determine her character as a merchant ship, the possession of more guns placed in other parts of the vessel would convert her into a war ship. The possession of armament no more converts a merchant ship into a war ship than the cowl makes the monk." There is in fact, he adds, "no difference between offensive and defensive armament; a six-inch gun can be used for either purpose." Cf. his pamphlet *Defensively Armed Merchant Ships and Submarine Warfare*, p. 20. Cf. also Prof. E. E. Stowell in the *New York American*, March 7, 1916.

<sup>1</sup> The Dutch government appears to have been the only neutral government which refused to admit defensively armed merchantmen of belligerent nationality to its ports on a footing of equality with ordinary unarmed vessels. By art. 4 of the declaration of neutrality issued by the government of the Netherlands such vessels were assimilated to the status of war ships and were admitted to Dutch ports only under the conditions to which the latter class of vessels were subject (exception being made on account of distress or bad weather). The armed British merchantman *Melita* was therefore not allowed to enter the Hook of Holland until it had jettisoned its armament. The British government protested against the action of the government of the Netherlands as being contrary to long-established usage, which sanctioned the right of merchant vessels to arm themselves for defence, and it called attention to the fact that Spain, the United States, and the principal South American republics recognized the legality of the practice and were admitting ships so armed to their ports on the same footing as ordinary merchant vessels. In its correspondence with the British government the Dutch government admitted that under the law of nations merchant vessels had a right to arm themselves for defence, but it did not follow from this right that neutrals were bound to admit such vessels to their ports on the same terms as unarmed trading vessels were admitted. Moreover, having announced its policy in the declaration of neutrality issued at the beginning of the war, it could not be altered during the course of the war at the demand of one of the belligerents without violating the principles of neutrality. The Dutch government, however, appears to have made no objection to the admission of *neutral* merchantmen armed for defence. Dutch orange book *Min. des Affrs. Etrang., Rec. de Diverses Communications, etc.*, September, 1916, p. 163; Higgins, *Defensively Armed Merchant Ships and Submarine Warfare*, p. 19, and *New York Times*, March 18, 1917. See also the correspondence between the British and Dutch

mere presence of armament did not create a presumption of hostile intent or impose on the vessel the onus of proving the contrary. On the contrary, the presumption was rather in favor of its innocent character, and there must be conclusive evidence of an intent to employ the armament for purposes of attack to justify a neutral government in treating it as a war ship. The attempt to draw a line of demarcation between armament which by reason of its amount and size may be presumed to be intended for offence and that which may be presumed to be intended only for defence was therefore abandoned, and the sounder test adopted that the presence of a "commission of war" on board, whatever the character of the armament, should be the determining factor. In short, not the mere presence of armament, but the use to which it was authorized to be put was to be the criterion. This rule was in accord with the best authority and practice.<sup>1</sup> The position of the German government so far as it denied the practicability of distinguishing between offensive and defensive armament appears, therefore, to have been sound and logical. Its contention, however, that a merchant vessel has no right to defend itself against attack by a war ship, and that every merchant vessel which carries armament for any purpose, whether for

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governments respecting the admission of defensively armed British merchantmen to Dutch ports in a British parliamentary paper, *Misc.*, No. 14 (1917), Cd. 8690, reproduced in Supplement to 12 *Amer. Jour. of Int. Law*, pp. 196 ff.

<sup>1</sup> The prize regulations of most maritime powers are based on this view. They affirm that the test for distinguishing between merchant vessels and war ships is not the mere presence or absence of armament, but whether the vessel is commanded by a regularly commissioned naval officer, whether it flies the naval ensign and whether the officers and crew are subject to military law and discipline. The German prize code itself, promulgated August 5, 1914, adopted in substance these tests. It says: "The criteria of a ship of war are: The war ensign (usually in conjunction with the pennant), a commander appointed by the State whose name appears on the list of officers of the navy, and a crew under naval discipline." (Pt. I, § 2.) There are also the indicia adopted by the Second Hague Conference and incorporated in convention VII relative to the conversion of merchant vessels into war ships (arts. 1-4). Lord Reay at the Second Hague Conference defined a "fighting ship" as one "flying a recognized flag, armed at the expense of the State for attacking the enemy, the officers and crew of which have been duly authorized for this purpose by the government of the State to which they belong." *Actes et Documents*, Vol. III, p. 862. Cf. also Bentwich, *War and the Private Citizen*, pp. 132-133; Hall, *Internat. Law*, 5th ed., p. 161, and the *Report* of the British royal commission on the supply of food in time of war, Vol. I, p. 22.

defence or attack, must be treated as a war ship, was contrary to the views of practically all the authorities, contrary to the practice of the past, and contrary to the rules laid down in the prize codes of all the maritime powers, including even that of Germany itself.

§ 250. **Status of Armed Merchantmen on the High Seas.** The status of an armed merchantman encountered on the high seas by an enemy war ship was a question which had to be decided by neutral governments as well as by belligerents themselves, because if such a vessel with neutral persons on board were treated as a war ship and sunk without warning, the neutral government concerned, before claiming reparation, would have to determine for itself whether the status of the vessel was that of a war ship and, therefore, whether it could be sunk without warning. The American memorandum laid down the following rule:

“When a belligerent war ship meets a merchantman on the high seas which is known to be enemy-owned and attempts to capture the vessel, the latter may exercise its right of self-protection either by flight or by resistance. The right to capture and the right to prevent capture are recognized as equally justifiable.”

But if, before being summoned to surrender, it should use its armament to keep the enemy ship at a distance, or if, after summons, it should resist or flee, the war ship might properly exercise force to compel it to surrender.<sup>1</sup> Nevertheless, a merchantman certain of being attacked might defend itself against such attack, otherwise the right of self-protection would be ineffectual. Armed merchant vessels carrying commissions as described above would, however, lose their status as peaceful merchant ships and could be treated by the enemy as war ships. Neutral persons taking passage on such vessels could not, therefore, claim the immunities accorded to passengers on peaceful trading ships.<sup>2</sup>

<sup>1</sup> The *New York Times* of April 27, 1916, criticised this rule as “impossible of justification in submarine warfare as it has been carried on by Germany.”

<sup>2</sup> The American memorandum pointed out that the tests which neutral governments might adopt in determining the status of armed merchantmen were not the same as those which belligerents themselves might adopt. A neutral seeking to avoid liability for failure to discharge its neutral duties might proceed on the assumption that an armed merchant vessel of belligerent nationality was armed for aggression and was, therefore, a war ship, when in reality its armament



§ 251. **The German Decree of February 8, 1916.** As has been said, the German government protested against the admission to neutral ports of armed merchant vessels on the same footing as unarmed trading vessels and denied the right of merchant vessels to defend themselves against attack by submarines or war ships, without thereby forfeiting their immunity as peaceful trading vessels. During the first year and a half of the war, however, the German government, in general, refrained from treating such ships as war ships, but in February, 1916, it announced that beginning on March 1, following, it would regard all armed enemy merchant vessels as auxiliary cruisers, and that whenever encountered on the high seas they would be sunk as war ships without warning, by the submarines or cruisers of the Teutonic allies.<sup>1</sup> At the same time the American government was informed that previous assurances in respect to *unarmed* merchant vessels would not be affected, but that these assurances were not understood by Germany to cover merchant vessels armed *solely for defence*.<sup>2</sup> In short,

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was intended only for defence; whereas a belligerent would not be justified in proceeding on such an assumption. The evidence of warlike character must be conclusive before a belligerent would be justified in destroying without warning a merchant vessel having on board neutral persons and property. In the absence of conclusive evidence he should rather act upon the presumption that an armed merchantman was not a war ship.

<sup>1</sup> Text in *European War*, No. 3, pp. 167 ff. On November 15, 1916, Herr Zimmermann, under secretary of state for foreign affairs, furnished a staff correspondent of the *New York Times* (*Times*, November 16, 1916) a statement in defence of Germany's reasons for destroying without warning armed British merchantmen. They had, he charged, repeatedly attacked German submarines and were not, therefore, entitled to be treated as peaceful trading vessels. Germany could not sit quietly by and see England enforcing an illegal blockade. Germany must meet her with "the same relentless determination as on all purely military fronts." "Our position, therefore, both militarily and from the viewpoint of international law, is irreproachable, and the propagandistic accusation and charge in connection with ships sunk, as agitated by the English press, are interesting and important only as indicating how hard England is being hit by our defensive submarine measures against England's hunger war and England's economic strangle-hold on the neutral nations in question."

<sup>2</sup> It was contended in the United States that the assurances given the American government on September 1 and October 5, 1915, that "liners" would not be sunk without warning, provided they did not offer resistance or attempt to escape, were violated by the new policy of Germany. The German pledges did not expressly distinguish between defensively armed and unarmed liners. Nevertheless, the German government called attention to the fact that in the correspondence with the American government over the sinking of the *Lusitania*, the American note of May 13, 1915, referred to the ship as an "unarmed merchantman," thus



Germany recognized no distinction between vessels armed for defence and those armed for offence. Both alike were to be assimilated to the status of war ships and would, whenever possible, be sunk as such. Among the reasons alleged for this decision was that the assurances given by the British government during the early months of the war, that its armed merchantmen would never fire upon an enemy ship unless they were previously attacked, had been violated in a number of instances. As evidence in support of this charge various exhibits were published, among others what purported to be a copy of certain instructions issued on February 25, 1915, by the British admiralty to merchant vessels armed for defence, advising them to use their guns against enemy submarines pursuing or approaching them.<sup>1</sup> Copies of these alleged secret instructions were found on the British steamer *Woodfield* which was sunk by a submarine in the Mediterranean Sea on November 3, 1915, and on the British steamer *Linkmoor*.

These instructions purported to regulate in detail artillery attack by British merchantmen and contained provisions relative to the reception, treatment, activity, and control of British gun crews on board such merchantmen. Most important of all, it was shown by the instructions that these armed vessels were not to await attack on the part of German submarines, but were to anticipate their aggression by themselves making the attack. It was thus plain, so the German authorities argued, that armed British merchantmen had official orders to attack German sub-

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leaving the inference that the American government recognized a distinction between armed and unarmed vessels. But at the time the earlier pledges were given, the American view that merchant vessels armed solely for defence were not regarded as war ships was well known to the German government. Consequently, the German promise not to sink merchant vessels was understood by the American government to cover those defensively armed.

<sup>1</sup> Memorandum of February 8, 1916, with twelve exhibits, issued as a white book by the German government, printed in English under the title of *Armed Merchantmen*, and widely distributed in the United States. Text in *European War*, No. 3, pp. 172 ff., and *New York Times*, March 18, 1916. Subsequently (October, 1916) the Germans claimed to have discovered secret instructions issued by the French minister of marine containing directions to the masters of armed merchantmen as to how they should attack German submarines. The text of the instructions, as published by the German government, however, shows that the directions given had reference only to manœuvres for defence in case of attack and therefore they were entirely legitimate. Text, *New York Times*, January 31, 1917.

marines "treacherously" wherever they came near to them; "that is to say, to conduct relentless warfare against them." Under these circumstances

"enemy merchantmen with guns no longer have any right to be considered as peaceable merchantmen. Therefore the German naval forces will receive orders within a short period, paying consideration to the interests of neutrals, to treat such vessels as belligerents. The German government brings this state of affairs to the knowledge of the neutral powers in order that they may warn their nationals against continuing to entrust their persons or property to armed merchantmen of the powers at war with the German Empire."

§ 252. **The British Reply to the German Charges.** In reply to the German allegations the British government stated that the instructions on which the Germans relied in support of their charges, issued in February and April, 1915, had been superseded by new instructions issued on October 20, 1915, and that the conduct of British merchantmen was then governed by these later instructions. The German government had apparently laid particular stress on paragraph 3 of the confidential instructions which reads as follows:

"If a submarine is obviously pursuing a ship, by day, and it is evident to the master that she has hostile intentions, the ship pursued should open fire in self-defence, notwithstanding the submarine may not have committed a definite hostile act such as firing a gun or torpedo."

The instructions of April, 1915, suggested that in view of the difficulty of distinguishing between friendly and hostile submarines, instead of British merchant vessels opening fire at long range, they "retain fire until the submarine has closed to a range of, say, 800 yards, at which fire is likely to be effective." The new instructions contained the following provision:

"The right of the crew of a merchant vessel to forcibly resist visit and search and fight in self-defence is well recognized in international law and expressly admitted by the German prize regulations in an addendum issued in June, 1914, at a time when it was known that numerous merchant vessels were being armed for self-defence. Armament is supplied solely for the purpose of resisting attack by an armed enemy vessel and must not be used for any other purpose whatsoever."

Regarding the circumstances under which armament might be used the instructions went on to say,

"experience has shown that hostile submarines and aircraft have frequently attacked merchant vessels without warning. It is important, therefore, that craft of this description should not be allowed to approach to short range at which a torpedo or bomb launched without notice would almost certainly be effective. British and allied submarines and aircraft have orders not to approach merchant vessels. Consequently it may be presumed that any submarine or aircraft which deliberately approaches or pursues a merchant vessel does so with hostile intention. In such cases fire may be opened in self-defence in order to prevent the hostile craft from closing to a range at which resistance to a sudden attack with bomb or torpedo would be impossible."<sup>1</sup>

It appears from these instructions that the armament which merchantmen were permitted to carry was to be used for the sole purpose of resisting attack. This is expressly affirmed by two different clauses in the instructions, and there are no other provisions which in any way modify or make exceptions to these two controlling declarations.

The last paragraph of the instructions quoted above, which laid down the presumption that a submarine which approached or pursued a merchant vessel did so with the intention of attacking it, in which case it might be fired upon as a measure of self-defence, was not inconsistent with the declaration mentioned above.

§ 253. **The German Charges Analyzed.** It is difficult, therefore, to find anything in the later British instructions to justify the decision of the German government to destroy without warning merchant vessels armed for purposes of defence. There was nothing in the British instructions that could be construed as an order or permission to the master of a merchant vessel to use his armament for purposes of offence.<sup>2</sup> The German decision, therefore, was based on the theory that a merchant vessel cannot carry armament for any purpose,

<sup>1</sup> The text of these instructions is printed in the *New York Times* of March 3, 1916.

<sup>2</sup> On February 9 Lord Robert Cecil, minister of war trade, issued a statement in which he said: "The British view has always been that defensively armed merchantmen must not fire on submarines or on any other war ships, except in self-defence. The Germans have twisted a passage in a document taken from a transport which they sank, into meaning that merchant vessels have instructions to take the offensive. This is not so. The passage in question, which lays down a maximum distance beyond which merchant ships are advised not to fire, must be read in conjunction with another passage which makes it perfectly clear that merchant vessels must not attack unless a submarine shows unmistakably hostile intentions."

not even for defence against unlawful attack, without forfeiting its status as a merchant vessel. The assumption on which the British instructions were based, namely, that where a German submarine was seen approaching a British merchant vessel, it was not for the purpose of visit and search, but with a view to destroying it, was entirely justified in view of the common practice of German submarines in sinking without warning enemy merchant vessels, unarmed and armed alike. To hold, therefore, that a merchant vessel which found itself pursued by a German submarine should assume that the submarine was approaching for the purpose of visit and search, and that if the merchant vessel forestalled attack by defending itself, it was guilty of committing an act of offensive warfare, would be to deny the inherent right of self-defence. There is, in fact, no sound distinction between the right of a merchant vessel to repel an attack directed against it and its right to forestall an attack, by itself first taking the initiative. Had it been the practice of German submarines to warn enemy merchant vessels or to stop and search them, as the law of nations required, the German contention would have had some merit.

§ 254. **The German Contention regarding the Right of Merchant Vessels to Carry Armament.** It remains now to examine the German contention that a merchant vessel of belligerent nationality cannot carry arms for defence and employ them to resist attack by an enemy war ship, without forfeiting its status and immunity as a peaceful trading vessel. Their contention was based, first of all, on the analogy between the status of a non-combatant in land warfare and that of a merchant vessel in maritime war. As a non-combatant cannot resist the regular armed forces of the enemy without forfeiting his right to be treated as a prisoner of war if captured, so a merchant vessel cannot resist attack by a lawfully commissioned war ship without losing its status as a peaceful trading vessel. The German argument readily admitted that the right of merchant vessels to carry arms for defence had once been generally recognized, but this right originated in the necessity for defence against pirates at a time when merchant vessels were never safe from the depredation of sea robbers. It was adopted to enable merchant vessels to defend themselves against pirates and was never intended to authorize defence against war ships.

The practice was continued after the disappearance of piracy from the seas, as a measure of defence against privateers whose conduct at times differed little from that of pirates. Now, however, since piracy had long ago ceased to exist and the practice of issuing commissions to privateers had been abolished by international agreement, the reasons which originally made necessary the practice of arming merchant vessels had ceased to exist and with it the rule of international law permitting the carrying of armament. In short, when the reason upon which a law is based disappears, the law itself ceases to exist.<sup>1</sup>

§ 255. **Practice of the Past.** As has been said, the practice of arming merchant vessels for purposes of defence is a very old one and, indeed, in the seventeenth century it was compulsory in England.<sup>2</sup> Not only did ships of belligerent nationality carry guns for self-defence in time of war, but they carried them also in time of peace. The practice was followed during the Napoleonic wars, and the ships of the East India company always went armed, certainly until 1834, and probably until a much later date.

The right of merchant vessels to carry arms and use them for defence was affirmed by Lord Stowell in the case of the *Catherine Elizabeth* in 1804<sup>3</sup> and by the Supreme Court of the United States in 1815 in the case of the *Nereide*.<sup>4</sup> The practice was sanctioned by the law of the United States, and opinions based on this view were given to American merchant vessels by more than one secretary of state.<sup>5</sup>

It was asserted during the recent war that chief justice Mar-

<sup>1</sup> This argument is specious. A rule of international law which has received the common assent of mankind and which has long been acted upon in practice ceases to exist only by virtue of common agreement. It was in this way that the law in regard to privateering was changed. The German argument, in fact, was nothing more than the contention that a single belligerent may by its own authority change a rule of international law to meet its own immediate interests. The argument that conditions had changed was merely a pretext.

<sup>2</sup> As to the early practice cf. Dr. A. P. Higgins' pamphlet entitled *Defensively Armed Merchant Ships and Submarine Warfare* (p. 6), London, 1917, which is a revised and enlarged edition of his article on *Armed Merchant Ships* published in the *International Law Association Reports* for 1913-1914, pp. 177 ff., in the *Amer. Jour. of Int. Law* (Vol. VIII, pp. 705-722), and issued with other articles and extracts as a Senate document in 1916 (64th Cong., 1st Ses., No. 332). Cf. also an address by Senator Lodge in the United States Senate on February 18, 1916 (*Cong. Record*, p. 3185).

<sup>3</sup> 5 Rob. 232.

<sup>4</sup> 9 Cranch, 388.

<sup>5</sup> Moore, *Digest of International Law*, Vol. II, p. 1070.

shall held the contrary view in the case of the *Nereide*, but this is an error.<sup>1</sup> In fact, the chief justice affirmed that "a belligerent has a perfect right to arm [his merchant vessels] in his own defence, and a neutral has a perfect right to transport his goods in a belligerent vessel." The practice of arming merchant vessels was so generally followed that the chief justice was moved to say that "in point of fact it is believed that a belligerent merchant vessel rarely sails unarmed," and he added that the right of such a vessel "to resist attack rests upon the same ground as the right to arm. Both are lawful." There is nothing in his opinion to warrant the view that the chief justice meant to limit the right of defence to attacks by pirates. Marshall's view was affirmed three years later by the Supreme Court in the case of the *Atalanta*,<sup>2</sup> and it was considered by Kent to be the settled law of the United States.<sup>3</sup> This right is expressly or by implication affirmed by the prize codes of many of the maritime powers, and it was approved by the Institute of International Law at its session of 1913 and embodied as a rule in its manual of naval warfare.<sup>4</sup> Finally, the right was affirmed by practically all the jurists and writers on international law prior to the outbreak of the recent war.<sup>5</sup> The law and practice are thus stated by Oppenheim:

<sup>1</sup> It was also asserted that Lord Stowell, in the case of the *Fanny*, adopted the view that a merchant vessel which carries and employs arms for defence forfeits its character as a peaceful merchantman and may be treated as though it were a war ship. This is also an error. In that case Lord Stowell was dealing not with an uncommissioned merchant vessel, but with a ship which had a "commission of war" on board, and which had been authorized by the British admiralty to take aboard men and guns and to "fight her way home." This she undertook to do, and after a severe engagement with the American war ship *General Armstrong* she was captured. Clearly, she was a fighting ship and not a peaceful trading vessel carrying arms solely for defence against unlawful aggression. Cf. Atherley-Jones, *Commerce in War*, p. 362.

<sup>2</sup> 3 Wheaton, 409 (1818). <sup>3</sup> *Commentaries*, 12th ed., p. 131.

<sup>4</sup> Art. 12, *Annuaire*, Vol. 26, p. 644.

<sup>5</sup> Among others by Hall, *Int. Law*, 6th ed., p. 524; Oppenheim, *Int. Law*, Vol. II, p. 85; Phillimore, *Int. Law*, Vol. III, § 339; Twiss, *Law of Nations*, Vol. II, § 97; Kent, *Int. Law*, (Abdy's ed., p. 246); Snow, *Int. Law*, p. 83; Wheaton, *Int. Law*, § 528; Stockton, *Int. Law*, p. 179; Walker, *Science of Int. Law*, p. 268; Halleck, *Int. Law*, Vol. II, p. 408; Nys, *Droit Int.*, Vol. III, p. 181; Wilson and Tucker, *Int. Law*, p. 243; Higgins, *War and the Private Citizen*, p. 129; De Boeck, *De la Propriété Privée Ennemie*, § 212; Dupuis, *Le Droit de la Guerre Maritime* (1899), p. 121; Fiore, *Le Droit Int.*, §§ 1627, 1698, and many others, including the German writers Perels, Niemeyer, and von Bar.



"In a sense the crews of merchantmen owned by subjects of the belligerents belong to the latter's armed forces. For those vessels are liable to be seized by enemy men-of-war, and if attacked for that purpose they can defend themselves, can return the attack and eventually seize the attacking men-of-war. The crews of merchantmen become in such cases combatants and enjoy all the privileges of the members of armed forces. But unless attacked they must not commit hostilities, and if they do so they are liable to be treated as criminals, just like private individuals committing hostilities in land warfare."<sup>1</sup>

§ 256. **The Right Attacked by Germany.** It was not until the year 1913 that the ancient right of merchant vessels to carry armament and resist attack from enemy war vessels was ever questioned. In that year discussion of the subject was provoked by the statement of Mr. Winston Churchill, first lord of the British admiralty, in the House of Commons (on March 26) that in view of the probability that a considerable number of foreign merchantmen might be rapidly converted into armed ships, thus exposing unarmed British merchant vessels to destruction by foreign liners carrying one effective gun and a few rounds of ammunition, owners of British merchantmen should take steps toward arming their vessels. This suggestion, he said, had been acted upon by many ship-owners, but as the expense was considerable, the admiralty felt that the greater portion of it should be borne by the State. The government had, therefore, decided to lend the necessary guns, to furnish a supply of ammunition, and to provide for the training of the gun crews. Mr. Churchill added, however, that the necessity for such measures was a matter of regret, and it was hoped that this "period of retrogression all over the world which has rendered them necessary might be succeeded by days of broader international confidence and agreement than those through which we are now passing." He also expressly stated in the following year that instructions had been given to such vessels not to attempt resistance to ordinary vessels of war, but only to endeavor to ward off attacks by converted merchant cruisers.<sup>2</sup>

<sup>1</sup> *International Law*, Vol. II, § 85. Snow (*Int. Law*, p. 83) remarks that "it may reasonably be expected in coming naval wars that steamers of the great lines will be armed so as to defend themselves from attack rather than seek convoy."

<sup>2</sup> Mr. A. P. Higgins, in 1914, in an article entitled "Armed Merchant Ships" (*Amer. Jour. of Int. Law*, Vol. VIII, p. 105), stated that there were at that time between forty and fifty British merchant vessels carrying guns for defence, that others were in process of being armed, and that German ships were similarly



§ 257. Discussion by the Institute of International Law. The announcement of the policy of the British government caused the Institute of International Law to take up at its session in 1913 the discussion of the subject of the right of merchant vessels to carry armament for defence, and it was there that the right was first attacked. Article 12 of the proposed manual of the Institute regarding the laws of maritime war affirmed, as has been said, the legality of the old practice; but during the discussion of the article Professor Triepel of Berlin advocated the suppression of the second paragraph on the ground that a merchantman had no right to defend itself, even when it was unlawfully attacked by an enemy war ship. If, he argued, the right to employ force for the purpose of defence against attack be admitted, it would be necessary to admit the legitimacy of resistance to capture, which in itself constituted attack.<sup>1</sup> The right of defence was upheld by Oppenheim, Lord Reay, Fiore, Clunet, Hagerup, Fusinato, Alberic Rolin, Rolin Jaequemyns, and others, and the article was adopted by a practically unanimous vote.<sup>2</sup>

being armed. The ships referred to above by Mr. Churchill were not the regular commissioned merchant cruisers, such as those under agreement between the admiralty and the Cunard Line, but uncommissioned merchant vessels which did not receive subventions from the State.

<sup>1</sup> *Annuaire de l'Institut*, Vol. 26 (1913), pp. 516-516. In an article entitled *Der Widerstand Feindlicher Handels Schiffe gegen die Aufbringung*, published in the *Zeitschrift für Völkerrecht*, 1914 (Bd. VIII, pp. 378-406), Professor Triepel developed at great length his argument that a merchant vessel cannot lawfully defend itself against attack by a war ship. He admitted that almost the entire weight of authority as well as of practice was against his contention; but the views of learned text writers, he said, do not make international law, nor do the decisions of national courts of one or two States. Moreover, it did not follow that Germany or Japan are bound to conform to the practice of Great Britain and the United States. A merchant vessel, he said, is not a subject of international law. Such rights as it possesses (e.g., resistance) *are determined by the State into whose power it falls!* If the taking of a prize is a lawful act of war, private persons may resist such an act only at the risk of being treated according to martial law, in case their resistance is not successful. To recognize such resistance as lawful, he concluded, would not promote the progress of humanity, but would retard it. One may well ask, however, if a practice which was universally recognized for two hundred years without question by any jurist, text writer, or court, but which, on the contrary, had been affirmed by every writer who considered the question and by the courts of every State which had occasion to pass on it, had not acquired the character of a rule of international law, what kind of action would be necessary to give it that character?

<sup>2</sup> An amendment proposed by von Bar of Göttingen, that "the right of lawful defence being reserved against acts which are evidently not permitted by the law of war," was rejected.

§ 258. **Views of Dr. Schramm.** The view advocated by Triepel at the meeting of the Institute in 1913, that a merchant vessel has no right to resist capture, was supported by Dr. Georg Schramm, legal adviser to the German admiralty, in his work entitled *Das Prisenrecht in seiner neuesten Gestalt* (1913).<sup>1</sup> An act of self-defence by a merchant ship, he says, would constitute an encroachment upon the legal rights of the belligerent, and this applies to neutral as well as enemy merchant vessels. It is, therefore, the duty of merchant vessels to submit to capture without resistance or forfeit their immunity as peaceful trading ships. The contrary opinion, put forth by English, American, and other writers, was, he said, based not only upon an erroneous understanding of the modern conception of the legal standardization of war as an armed combat between States, but also upon a denial of the legal principle which permits only organized forces of States to use arms for offensive purposes in land as well as in sea warfare. Consequently, the crews of merchant vessels which attack a war ship are not entitled, if captured, to be treated as prisoners of war, but may be punished for *Kriegsverbrechen* under the penal code.

The attempt of these two German professors, both of whom were connected with the German admiralty and who expressed its opinions rather than those held at the time by the majority of German jurists, to argue away the long and hitherto universally recognized right of merchant vessels to defend themselves against attack was successfully answered by two high English authorities, Higgins and Oppenheim. Higgins thus stated his view of the law and practice:

"The right of a merchant ship to defend herself, and to be armed for that purpose, has not, so far as I am aware, been doubted for two centuries, until the question has again become one of practical importance. The historical evidence of the practice down to the year 1815 is overwhelming. Dr. Schramm, in his elaborate denial of the right, fails to distinguish between the position in which a belligerent war ship stands to an enemy merchant ship. This failure is important, and goes to the root of the matter, for whereas the visit of a belligerent war ship to an enemy merchant ship is, under existing law, merely the first step to capture and is itself a hostile act, and is undertaken solely in order to enable the captor to ascertain that the ship is one which is not exempt by custom, treaty or convention from capture, the visit to a neutral ship, though justified by

<sup>1</sup> Pp. 308-310.

the fact of the existence of war, is not a hostile act. A belligerent war ship has a right to capture an enemy merchantman and the latter is under no duty to submit; it has a corresponding right to resist capture which is an act of violence and hostility. By resisting, the belligerent violates no duty; he is held by force and may escape if he can. But forcible resistance, as distinct from flight, on the part of a neutral merchant ship is universally admitted as a just ground for the condemnation of the ship, for a neutral is under a duty to submit to belligerent visit."<sup>1</sup>

§ 259. **Views of Professor Oppenheim.** Professor Oppenheim in an article entitled *Die Stellung der feindlichen Kaufahrtschiffe im See Krieg*, published in the *Zeitschrift für Völkerrecht*,<sup>2</sup> pointed out that Dr. Schramm's premises were wrong and his deductions false. First of all, Dr. Schramm made no distinction between *neutral* and *enemy* merchant vessels. Stoppage and search of neutral vessels, as Professor Oppenheim points out, rests on a belligerent *right*, whereas the search of enemy merchant vessels rests upon a *duty*. It is the duty of neutral vessels to submit without resistance to search, for neglect of which they may be punished; on the contrary, a belligerent has no *right* to search an enemy merchant vessel. He has a right to capture it, but that right implies no duty on the part of the ship to submit without resistance.<sup>3</sup> On the contrary, it has a right to resist and defend itself against capture. Such an act is a lawful act of war, and, if captured, the officers and crew are entitled under article 6 of the eleventh Hague convention to be treated as prisoners of war. Furthermore, as Professor Oppenheim pointed out, Dr. Schramm's argument that only *organized* forces are entitled to be treated as lawful combatants is contrary to article 2 of the Hague convention respecting the laws and customs of war on land, which expressly affirms the right of the inhabitants to take up arms and resist an invader, and if they have not had time to organize themselves, they are entitled to be treated as lawful combatants, provided only they carry their arms openly and conform to the laws and customs of war. Now the crew of a merchant vessel which defends itself against attack are in an analogous position. Finally, Professor Oppenheim added that in the presence of the threatened transformation of merchant vessels into war ships by belligerents, the right of defence had

<sup>1</sup> "Armed Merchant Ships," *Amer. Jour. of Int. Law*, Vol. VIII, p. 705.

<sup>2</sup> Bd. VIII (1914), pp. 154-169.

<sup>3</sup> *Ibid.*, p. 162.

assumed a practical importance unknown since the days when piracy was common.<sup>1</sup>

§ 260. **The German Argument Analyzed.** Down to the outbreak of the late war it appears that only three writers of repute (Schramm, Triepel, and Eysinga) had ventured to attack the validity of the old rule. Almost without exception it had been upheld by the text writers and jurists of other countries than Germany, and even in Germany only two writers of repute had found fault with it.<sup>2</sup> In fact, a schedule added to the German

<sup>1</sup> *Ibid.*, p. 169. Jonkheer von Eysinga, professor in the University of Leyden, in a paper read before the International Law Association at the Hague in September, 1914, entitled *Les Navires de Commerce Armés* (*Int. Law Assoc. Reports* for 1913-1914, pp. 171-176), took issue with Professor Oppenheim and expressed the opinion that he had not successfully answered Dr. Schramm's arguments. The policy of arming merchant vessels, he feared, was likely to produce "sorry consequences," for defensively armed vessels would hardly confine their activities to defence. Such a policy, if developed along the lines proposed by Mr. Churchill, would mean the "harking back to the status antecedent to the great reforms in maritime law, when the right of capturing enemy merchantmen was exercised not only by men of war but by privateers." There was some reason, he said, for the policy then, but those reasons had disappeared with the abolition of privateering. "Since the development of maritime law has excluded arbitrary procedure more and more, the power of arresting merchantmen in particular now belongs only to men of war, because privateering has been abolished." But like Dr. Schramm, he fails to distinguish between the rights of neutral and enemy merchant ships when approached by belligerent war ships. Sir Graham Bower in an article in the *Contemporary Review* for November, 1917, expressed the opinion that the right to destroy merchant vessels ought to be prohibited, in return for which they should be forbidden to arm. This argument is illogical, since it does not follow that because merchant vessels ought to be spared from destruction on grounds of humanity, to be entitled to this immunity they should not be allowed to carry arms for defence. Cf. the criticism of Professor Woolsey in 12 *Amer. Jour. of Int. Law*, p. 372.

<sup>2</sup> In addition to the German jurists who upheld the right of defence at the meeting of the Institute of International Law in 1913 may be mentioned another distinguished German authority, Dr. Wehberg, who, in his treatise (*Das Seekriegsrecht*, 1915), published after the outbreak of the recent war, attacked Dr. Schramm's doctrine that a merchant vessel has no right to resist attack and that the officers and crews of captured armed merchantmen may be treated as *francs-tireurs*. "It is unfounded to say," Dr. Wehberg remarks, "that because in war on land armed resistance may not be carried out by civilians, therefore that is also the case in war at sea. It might equally well be said that on land private property is inviolable, therefore the same must apply to war at sea. But such a position is untenable. . . . The doctrine that 'armed resistance' is only allowed to organized troops is, in the general view, as false as the assertion that war is only a legal relation between States and excludes the peaceful population (p. 283). The enemy merchant ship has then the right of defence against enemy attack, and this right it can exercise against visit; for this is indeed the first act of capture." (P. 284.) He also adds that "no single example can be produced from international precedents in which States have held resistance as not being lawful."

prize code in July, 1914, admits the right of belligerent merchant vessels to arm and resist attack, and it declares that if they do so and the officers and crews are captured, they shall be treated as prisoners of war.<sup>1</sup> The analogy which the Germans sought to establish between the rules of land and naval warfare in support of their contention that merchant vessels have no right of resistance, and that in case they offer resistance their crews may be treated as *francs-tireurs*, is not well founded. It is, of course, true that the civil population of territory which has passed under the effective occupation of the enemy have no right to resist the authority of the military occupant without organizing themselves in conformity with the provisions of the Hague convention respecting the laws and customs of war on land, and if they do so and are captured, they may be denied the treatment accorded to prisoners of war. But there is no such prohibition on the right of the inhabitants of *territory not yet occupied* by the enemy to take up arms and resist the approach of an invader. On the contrary, article 2 of the above-mentioned convention expressly affirms that right, subject to the conditions already mentioned, and those who avail of it do not forfeit their rights as lawful combatants. As Professor Oppenheim pointed out in the article cited above, a merchantman which resists attack is in the position of a civilian who in land warfare arms himself and attempts to beat off the invader. The analogy between land and naval warfare, therefore, if correctly applied, supports rather than denies the right of defence on the part of merchant vessels. The German contention that the rule in respect to the arming of merchant vessels was adopted to enable them to repel attacks by pirates and consequently ceased to exist with the disappearance of piracy is equally inadmissible. There is nothing in the naval histories, in the decisions of the prize courts, or in the opinions of writers on international law to justify the view that the right of defence is limited to the repelling of attacks against pirates, and it is somewhat singular that no such view was put forward in Germany until the eve of the outbreak of the recent war. The German government in its correspondence with the American government admitted that the rule was continued after the dis-

<sup>1</sup> Huberich and King, *The Prize Code of the German Empire as in Force July 1, 1915*, p. 75.

appearance of piracy in order to enable merchantmen to defend themselves against privateers. Now so long as privateering was recognized as lawful, a privateer which carried a commission from a lawfully recognized belligerent was as much a ship of war as a cruiser or a submarine. Therefore, if it was lawful for a merchant vessel to arm and defend itself against the attacks of the one, why was it not equally lawful to resist the attacks of the other? <sup>1</sup> Legally there is no difference between the status of a submarine and a privateer. The only conclusion, therefore, is that the rule was intended to allow resistance against unlawful attack from any enemy craft, whether a piratical vessel, a privateer, a cruiser, or other vessel. The fact is — as has been recently pointed out by more than one writer on international law <sup>2</sup> — the methods of submarine warfare as practised by the Germans have strengthened rather than diminished the necessity for the continuance of the old rule. In many respects the procedure of the German submarine commanders was more reprehensible than that of privateers and pirates in the old days. Their methods were analogous to those of the assassin in ambush; they destroyed indiscriminately armed and unarmed merchant vessels; rarely warning their victims, they launched their torpedoes against peaceful and helpless trading vessels, hospital ships, and Belgian relief steamers without making any provision at all or only inadequate provision for the safety of the persons on board. To hold that a merchant vessel may arm and defend itself against the attacks of privateers and pirates and yet to argue that it has no lawful right to resist the attacks of submarines which sink their victims without warning is illogical and absurd.

§ 261. **Right of Unarmed Merchant Vessels to Resist Attack; Case of Captain Fryatt.** May an *unarmed* enemy merchant vessel defend itself against attack? A famous and much discussed case in which this question was raised was that of Captain Fryatt, who, while piloting a British unarmed merchant vessel, the *Brussels*, across the Channel in March, 1915, refused to obey the summons of a German submarine to surrender and undertook, though without success, to ram the submarine

<sup>1</sup> Cf. Higgins, p. 26.

<sup>2</sup> For example by Mr. Higgins, *op. cit.*, p. 26, and Professor E. E. Stowell in the *New York American* of March 7, 1916.



as it approached his vessel. Subsequently the doughty captain fell into the hands of the Germans, who refused to treat him as a prisoner of war, but court-martialed and shot him on the charge of having committed "a *franc-tireur* crime against the sea forces of Germany."<sup>1</sup> The act aroused intense indignation, not to say horror, throughout England and was classed with the shooting of nurse Cavell as another act of German barbarity in violation of the laws of war and of humanity, and the prime minister stated in the House of Commons that Great Britain would never resume diplomatic relations with Germany until due reparation was made for the murder of Captain Fryatt.<sup>2</sup> English public opinion was stirred to a high pitch, and many demands were made that the crime should be avenged by reprisals against Germany; but the government wisely decided not to resort to this doubtful remedy.

<sup>1</sup> In an official *communiqué* issued by the German government on July 28 announcing the execution of Captain Fryatt, it was stated that "the accused was condemned to death because, although he was not a member of a combatant force, he made an attempt on the afternoon of March 20, 1916, to ram the German submarine U-23." "On the occasion in question, disregarding the U-boat's signal to stop and show his national flag, he turned at a critical moment at high speed on the submarine, which escaped the steamer by a few metres only by immediately diving. He confessed that in so doing he had acted in accordance with the instructions of the admiralty."

The *communiqué* concluded: "One of the many nefarious *franc-tireur* proceedings of the British merchant marine against our war vessels has thus found a belated but merited expiation."

<sup>2</sup> In a communication dated July 29, 1916, to the American ambassador Mr. Page, Sir Edward Grey, adverting to the rumor that Captain Fryatt had been shot as a *franc-tireur*, said: "His Majesty's government finds it difficult to believe that a master of a merchant vessel, who after German submarines had adopted the practice of sinking merchant vessels without warning and without regard for the lives of the passengers or crew, took the step which appeared to afford the only chance of saving not only his vessel, but the lives of all on board, can have been shot deliberately in cold blood for this action. If the German government has in fact perpetrated such a crime in the case of a British subject held prisoner by them, it is evident that a most serious condition of affairs has arisen."

On July 31, the truth of the report having been confirmed, the prime minister made the following statement in the House of Commons: "His Majesty's government have heard with the utmost indignation of this atrocious crime against the law of nations and the usages of war. Coming as it does, contemporaneously with the lawless cruelties to the population of Lille and other occupied districts of France, it shows that the German high command have under the stress of military defeat renewed their policy of terrorism. It is impossible to guess to what further atrocities they may proceed. His Majesty's government, therefore, desire to repeat emphatically that they are resolved that such crimes shall not, if they can help it, go unpunished. When the time arrives, they are determined to bring to justice the criminals, whoever they may be, and whatever their station."



§ 262. German Defence of the Shooting of Captain Fryatt. In general, the position of the German authorities was that captain Fryatt was not "embodied in the armed forces"; his status, therefore, was analogous to that of a *franc-tireur* in land warfare. For want of a more exact legal term he was variously described in the German press despatches as a "pirate," a "sea *franc-tireur*," a "sea freebooter," and the like. According to the press despatches, the military court which condemned him<sup>1</sup> relied upon the German prize regulations promulgated in July, 1914, which provide that the officers and crews of armed merchantmen which attack or resist German war ships are beyond the pale of the law and are to be treated as pirates and freebooters. Presumably the provisions referred to are the following:

"1. The exercise of the right to visit, search and capture, as well as every attack on the part of an *armed* merchant ship upon a German or neutral merchant ship, is considered an act of piracy. The crew is to be proceeded against in accordance with the regulations as to extraordinary martial law procedure.

"2. If an *armed* merchant vessel offers armed resistance against measures taken under the law of prize, this is to be broken down by all means possible. The enemy government is responsible for any damage thereby caused to the ship, cargo, and passengers. The crew are to be treated as prisoners of war. The passengers are to be liberated unless it is proved that they have taken part in the resistance. In the latter case they are to be proceeded against in accordance with the extraordinary martial law procedure."<sup>2</sup>

<sup>1</sup> Little is known regarding the nature of the trial, as no particulars were given in the official statements issued. The proceedings appear to have been secret, but the accused is said to have been defended by Major Neumann, "in civil life an attorney and *Justizrat*." Ambassador Gerard states that he sent two formal notes to the German foreign office requesting that he be allowed to see the accused and to hire counsel to represent him. The foreign office, he says, approved the request, but the "answer of the German admiralty to my notes was to cause the trial to proceed the morning after the day on which my notes were delivered and to shoot Fryatt before noon of the same day." *My Four Years in Germany*, p. 193. The British government made a request through the American embassy for a postponement of the trial until representations could be made and suitable defence provided. This request, however, was not granted. As in the case of Miss Cavell, the trial appears to have been conducted hurriedly, and the condemned man was shot immediately after judgment was pronounced. The correspondence between Sir Edward Grey and the American ambassador relative to the case may be found in the *New York Times Current History Magazine* of August 20, 1916.

<sup>2</sup> Huberich and King, *The Prize Code of the German Empire as in Force July 1, 1915*, p. 75. Some attempt appears to have been made to justify the shooting

§ 263. **The German Contention Analyzed.** It will be noted that the second paragraph of these regulations in effect admits the right of belligerent merchant vessels to arm and resist attack, and if they do so, the crew, if captured, are to be treated as prisoners of war.<sup>1</sup> But Captain Fryatt's vessel was *unarmed*, and it was because of this fact that he was shot as a *franc-tireur*. In short, the German authorities refused to admit the right of an ~~unarmed belligerent merchant vessel to offer resistance, this on the principle that such a vessel cannot be said to be "embodied in the armed forces."~~<sup>2</sup> But this distinction is not well founded and was not in accord with the practice of the past, which allowed any merchantman, whether armed or unarmed, to defend itself. Moreover, even if Captain Fryatt's vessel had been armed, it would not necessarily have been "embodied" in the armed forces, for according to the generally accepted

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of Captain Fryatt as an act of reprisal for various alleged violations by the Entente powers of the laws of war, particularly for the British "starvation" blockade and for the alleged conduct of the British commander of the patrol boat *Baralong* in killing members of the crew of a German submarine.

<sup>1</sup> It will be recalled, however, that the German government in its correspondence with the American government denied the right which is here recognized by its own prize code. Dr. J. B. Scott, discussing the above-mentioned article of the German prize code (*Amer. Jour. of Int. Law*, October, 1916, p. 876), pertinently remarks: "It left untouched the right of belligerent merchant vessels to defend themselves against attack, whether armed or unarmed, by means of guns or by ramming the enemy vessel, if the master of the merchantman is skilful enough so to do. The article does not state the manner in which the vessel is to be armed, and it is no strained construction to consider the merchantman in its entirety as an arm so far as the submarine is concerned." In the House of Commons on December 21, 1916, the first lord of the admiralty asked whether the *Brussels* was armed. To this question Sir Edward Carson replied that His Majesty's government could not admit any distinction between the rights of an unarmed merchant vessel and one which was armed for defensive purposes. "A merchant seaman," he said, "enjoys the immemorial right of defending his vessel against attack and against visit or search by the enemy, by any means in his power, but he must not seek out an enemy in order to attack him, that being a function reserved to commanders of men of war." "So far as I am aware," he added, "all neutral powers take the same view, which is clearly indicated in the prize regulations of the Germans themselves." *Solicitors' Journal and Weekly Reporter*, December 30, 1916, p. 163.

<sup>2</sup> In pursuance of this distinction the German authorities refrained from putting to death Captain Vlaikie of the *Caledonia*, an *armed* merchantman charged with having rammed a German submarine. The implication was, therefore, that if the *Brussels* had been *armed*, the German authorities would have taken a different view of the status of Captain Fryatt. The Germans also appear to have spared the life of the captain of the British armed merchantman *Eskimo*, which engaged a German war ship off Skagerrak in 1917.

doctrine a vessel must carry a commission of war in order to give it this character. Furthermore, in shooting Captain Fryatt as a sea *franc-tireur* on the ground that not being "embodied in the armed forces" of his government he was not entitled to be treated as a prisoner of war, the Germans proceeded on the unwarranted assumption that his status was the same as that of a civilian in land warfare who resists the authority of a military occupant, rather than that of a civilian who in unoccupied territory resists the approach of an invader. The German contention could be justified only on the assumption that the portion of the sea in which his act of resistance occurred was under the effective "occupation" of the German naval forces, which was, of course, absurd. The German distinction between the right of an armed vessel to resist attack, which they appear to have admitted, and the right of an unarmed vessel to do likewise, which they denied, is illogical and unreasonable. To say that it is lawful for a person or a vessel which happens to be armed, to resist attack and at the same time to argue that if he or it is not armed, the right of defence is unlawful, impresses one as highly specious. As it was, Captain Fryatt used the only arm available, his ship, but because he used it instead of a gun, he was shot as a *franc-tireur*.

It is also difficult to find in paragraph 1 of the German prize regulations, quoted above, any authority for treating him as a *franc-tireur* or a pirate, even admitting that a single government may construct its own definition of piracy; for by the terms of this clause the attack which is there stigmatized as piracy is attack upon *merchant* vessels and not attacks upon submarines or other *war* vessels, and it may be seriously doubted whether the authors of the provision intended that it should apply to attacks upon war vessels.

§ 264. Nature of Captain Fryatt's Offence. Captain Fryatt's offence appears to have been aggravated by the fact that he refused to obey the summons of the submarine to surrender, but turned and headed towards it while it was approaching his vessel.<sup>1</sup> His act, the Germans argued, was not one of defence

<sup>1</sup> The fact that Captain Fryatt admitted that he was following the instructions of the British admiralty, and that he had been presented with a gold watch for having on another occasion compelled a submarine to submerge also appears to have aggravated his offence in the eyes of the German authorities. One is tempted to ask whether the conduct of the British admiralty in thus recognizing and re-

but really an attempt at assassination. It is true, as charged, that he attempted to ram the submarine; but under the circumstances his act was clearly one of defence. He saw a German submarine heading for his own unarmed vessel at a time when German submarines were daily torpedoing peaceful trading vessels without warning and without providing for the safety of their crews and passengers. He had on board a large number of passengers all of whom were non-combatants, and it was his duty to save their lives if possible from unlawful destruction. In view of the practices of the German submarines he was fully justified in assuming that the submarine intended to sink his vessel, and he had no reason to suppose that it would make any effort to save the lives of those intrusted to his care.<sup>1</sup> He therefore endeavored to forestall the attack of the approaching submarine by ramming it or causing it to submerge. In fact, he compelled it to submerge, and it escaped without injury. His crime, therefore, was not in ramming the submarine or injuring it in any way, but merely in preventing it from carrying out its own designs. It was not, therefore, the act of an assassin, a *franc-tireur*, or a pirate, nor was there any element of perfidy, insolence, dissimulation, or treachery in it, as the German press charged.<sup>2</sup> It was the act of a gallant and honorable sea captain, inspired by a high sense of duty toward those whose lives were intrusted to his protection, and it was an act of pure

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warding a gallant captain for foiling the designs of an enemy submarine and thus saving his ship and its passengers from destruction was more reprehensible than the conduct of the German government in decorating the commander of the submarine which sank the *Lusitania* and sent to their deaths more than one thousand unoffending non-combatants, and which struck off a medal in honor of the event.

<sup>1</sup> On the very day (March 28, 1915) on which Captain Fryatt compelled the German submarine to submerge, the English merchantman *Falaba*, which obeyed the summons of a German submarine to stop, was torpedoed with the loss of over one hundred lives. During the week following his execution the press despatches reported the sinking by German submarines of thirteen merchant vessels, seven of which flew neutral flags, among them the Italian liner *Letrimbo* carrying 113 passengers, a large number of whom were drowned. On July 23, four days before his execution, the *Re d'Italia*, an Italian merchant vessel, while on a voyage from Genoa to New York, was attacked by a submarine, but happily the captain was able to drive it away. According to German theory and practice the captain of the Italian vessel would have been liable to be shot as a *franc-tireur* for thus defending his ship from destruction.

<sup>2</sup> Cf. the *Weser Zeitung* of July 29, 1916, and the *Kölnische Volks Zeitung* of the same date.

self-defence<sup>1</sup> and a perfectly legitimate act of war for which he was entitled to the treatment accorded by the law of nations to prisoners of war. When the case is stripped of the subtleties, technicalities, and sophistry with which German logic clothed it, the execution of Captain Fryatt was a plain act of judicial murder, without military necessity, in violation of the most fundamental notions of the right of self-defence and contrary to the well-established laws of war. This was the verdict of the neutral world, and it is the conclusion of impartial writers on international law who have considered the case.<sup>2</sup>

§ 265. **Right of Armed Neutral Merchantmen to Resist Attack.** What has been said above in regard to the right of merchant vessels to arm and resist attack from whatever source directed, is intended to apply in the main to merchant vessels of belligerent nationality. Have *neutral* merchant vessels an equal right? In particular, may they resist visit and search as well as capture by the commissioned war vessels of a belligerent? Nearly all writers on international law have distinguished between the two classes of ships, so far as their right of resistance is concerned. The failure of Dr. Schramm to make such a distinction, as has been said, was the point where his whole argu-

<sup>1</sup> Higgins (*op. cit.*, p. 21) justly remarks that an unarmed merchant ship which under such circumstances heads for a submarine with a view to repelling its attack is as much defending itself as an armed merchantman is by firing her gun. In short, there is no logical distinction between resisting an actual attack and forestalling what is obviously intended to be an attack.

<sup>2</sup> Cf. Scott, 10 *Amer. Jour. of Int. Law*, p. 877; Higgins, *op. cit.*, p. 21, and Munro Smith (leaflet published by the American Rights League). The *London Times* (weekly ed. of August 4, 1916) declared that the shooting of Captain Fryatt "would remain, in the judgment of the English speaking peoples, of the allies, and, as we believe, of all fair minded neutrals, nothing but a foul judicial murder, a crime to be remembered like the death of Miss Cavell, and one day to be punished with it." Cf. also the *London Solicitors' Journal and Weekly Reporter* of August 5, 1916, pp. 662, 670. The *New York Times* (July 30, 1916) probably reflected American opinion when it said: "The shooting of Captain Fryatt was a deliberate murder, a trifle to a government that has so many thousands to answer for."

Nevertheless, a German commission appointed to investigate charges that international law had been violated in the treatment of prisoners, reported in the spring of 1919 that the execution of Captain Fryatt was not in violation of international law, but it expressed "regret that the sentence had been carried out so hastily." Two socialist members of the commission dissented and reported that Captain Fryatt was not allowed a proper defence; that being a civilian, he was not liable to trial by a court martial; that he had a right to defend his ship, and that the sentence was an "unpardonable judicial murder." 46 *Clunet*, 674.

ment breaks down. Much of what he said against the right of resistance is defensible if limited to neutral merchant vessels, but it is not true of merchant vessels of belligerent nationality. Neutral vessels may undoubtedly resist attack by pirates, but there is and has long been a general agreement that they have no lawful right to resist the exercise of the right of visit or search by the commissioned public vessels of a belligerent, and if they do so, they are liable to capture and condemnation, and their officers and crews are probably not entitled to be treated as prisoners of war, such as the officers and crews of belligerent merchant vessels who offer resistance are.<sup>1</sup>

But does it follow that a neutral merchant vessel may not arm and resist attacks by submarines or other craft which do not comply with the long-established rules of international law governing the exercise of the right of visit, search, and prize destruction? In short, may it resist what are admittedly unlawful attacks by the commissioned war vessels of a belligerent?

§ 266. **The Arming of American Merchant Vessels in 1917.** This question was raised during the recent war by the action of the President of the United States in March, 1917, while the United States was still a neutral power, in issuing instructions to the naval authorities to place "armed guards" on such merchant vessels registered under the American flag as might desire them, and authorizing the guards to defend the vessels on which they were placed against attack by German submarines. This decision was reached in consequence of the announcement of the German government in January, 1917, that beginning on February 1, all merchant vessels, enemy and neutral alike, traversing the waters of the so-called "barred" zone, would if possible be torpedoed and sunk without visit and search, without warning, and without making any provision for the safety of the persons on board. In accordance with this decision merchant vessels sailing through the barred zone were equipped with armament from the government arsenals and with export gunners from the navy as rapidly as they could be supplied, and a very considerable number of vessels had thus been armed before the outbreak of war between Germany and the United States in April, 1917. The masters were to remain in charge and to navigate the vessels, but the gunners had in-

<sup>1</sup> Cf. Higgins, *op. cit.*, pp. 13, 23, and Scott, 10 *Amer. Jour. of Int. Law*, p. 867.



structions from the navy and were independent of the control of the masters. They and not the latter were to determine when resistance should be offered to submarines. What was the status of vessels thus armed?

§ 267. **Defence of the American Policy.** The American government took the position that the act of arming its merchantmen was in no sense an act of hostility toward Germany, but simply a measure entered upon for the purpose of enabling peaceful and unoffending trading vessels to defend themselves against unlawful destruction by submarines regardless of their nationality. Such vessels, therefore, did not lose their status as ordinary trading vessels; they did not become naval auxiliaries; they were not authorized to resist visit and search on the part of submarines or other belligerent war vessels.) It is difficult to see how such a measure constituted an encroachment upon the lawful rights of Germany or any other belligerent. The belligerent right of visit, search, and capture and even of lawful destruction remained unimpaired. What the American government had in view was to prevent belligerents from exercising their right of destruction as against American vessels in a manner contrary to the law governing the procedure of capture and prize destruction.<sup>1</sup> The American government never contested the right of German submarines to capture and even to sink, under certain conditions, neutral vessels. In short, the purpose of arming American vessels was not to protect them against lawful capture or destruction, but merely to insure them the protection and safeguards to which they were entitled under the well-established rules of international law. It is hard to avoid the conclusion that the belligerent who objected to such a policy, founded as it was on the natural and inherent right of self-defence, did so not because it was a real encroachment upon his lawful rights, but because it might prevent him from destroying ships which he had no right to destroy or compel him to observe the requirements of the law governing prize destruction.

§ 268. **Legality of the American Policy Attacked.** Nevertheless, the view was expressed throughout Germany, and it found a few supporters among German apologists in the United

<sup>1</sup> The procedure, it may be added, required by the German prize code itself (§ 116).



States, that neutral merchant vessels had no lawful right to arm and resist attack by German submarines, and that those which did so would be in the position of pirates. Had it been the practice of German submarines to exercise the right of visit and search and to comply with the law governing capture and prize destruction, this proposition would have been unassailable. But the argument breaks down when applied to war craft which do not exercise their belligerent rights conformably to the law of nations. Those who adopted this view confounded resistance to unlawful attacks with resistance to the exercise of a lawful belligerent right.

Criticism was also made against the instructions which appear to have been given to the gunners placed on American vessels, to forestall attacks of submarines by themselves first opening fire when they were certain of an intended attack. This, it was said, would be using armament for offensive purposes and therefore an act of war. Such a view, however, was based on a confusion of ideas. To admit that a merchant vessel may repel an attack directed against it, but to deny it the right to take the initiative to forestall what is evidently intended to be an attack, is an illogical distinction and would in many cases render the right of defence ineffectual.

## CHAPTER XVII

### LAND AND NAVAL BOMBARDMENTS

§ 269. German and Austrian Bombardment of undefended towns; § 270. Charges against the Entente Powers; § 271. Provisions of the Hague Convention regarding Land Bombardments; § 272. Bombardments without Notice; § 273. Naval Bombardments; § 274. Views and Practice as to Bombardment of undefended coast towns; § 275. Provisions of the Hague Convention regarding Naval Bombardment; § 276. Interpretation of the Hague Rules; § 277. The German Contention as to the Right to Bombard English Coast Towns; § 278. The German Arguments Analyzed.

§ 269. German and Austrian Bombardment of Undefended Towns. During the late war many charges and countercharges were made by each belligerent against his adversaries for having bombarded open and undefended towns, cities, and villages in violation of the Hague conventions and for having bombarded fortified and defended places without giving the preliminary notice required by the same conventions. The Germans were as usual the most frequent violators of these rules.<sup>1</sup> Among the towns of the former class which they were charged with bombarding were Ypres, Mars-la-Tour, Malines, Alost, Albert, Etain, Fisme, Bacarat, Termonde, Pont-à-Mousson,<sup>2</sup> Rheims,

<sup>1</sup> As to these charges cf. *The Case of Belgium*, pp. xiii ff. and pp. 21 ff.; Maccas, *German Barbarism*, ch. VIII; Massart, *Belgians under the German Eagle*, pp. 123 ff.; Saint Yves, *Les Responsabilités de l'Allemagne dans la Guerre de 1914*, pp. 352 ff.; reports of the Belgian official commission of inquiry, especially the seventh and eleventh reports; the report of the French commission of inquiry, p. 14; Merignhac in 24 *Rev. Gén. de Droit Int. Pub.* (1917), p. 14; Lettenhove, *La Guerre et les Œuvres d'Art en Belgique*, pp. 35 ff.; Clunet, 1915, pp. 567, 814, 870; 1916, pp. 385 ff. and 1460 ff., and 1917, pp. 1379 ff. and 1823 ff.

<sup>2</sup> For the details regarding the bombardment of Pont-à-Mousson cf. Carrillo, *Among the Ruins*, pp. 306 ff. On August 16, 1914, the French government addressed a memorandum to the powers in which it protested against the German bombardment of Pont-à-Mousson, an "open and undefended" town of 13,000 inhabitants. No preliminary notice was given, and the bombardment, it was charged, was directed particularly against a hospital, itself a historic monument, from the top of which the Red Cross flag flew, and which was plainly visible to the artillery commander. Some forty people, mostly women and children, were killed and as many were wounded. Cf. the text of the memorandum in a document published by the French minister of foreign affairs under the title *Les Violations des Lois de la Guerre par l'Allemagne* (1915), No. 104, pp. 180 ff. Cf. also Maccas, p. 56.

Douai, Lille, Gerbevillier, Dompierre-aux-Bois, Soissons, Sampigny, Arras, Nancy, Lunéville, Nomeny, Bar-le-Duc, Amiens, Hazebrouck, Epernay, Saint-Dié,<sup>1</sup> and many others. The facts as to the character of many of the towns which are alleged to have been bombarded are not always clear. The accounts state that some of them were "open and undefended"; that others were "unfortified," and that others, such as Malines, Heyst-op-den-Berg, Alost, and Termonde were without fortifications, military depots, stores, or troops. Some of them certainly were defended in the sense of being occupied by troops, and of containing depots and military stores, and some were defended by batteries; others, however, were small towns and villages with no means of defence against modern artillery and could have been easily taken by infantry troops without bombardment. In every case non-combatants, including women and children, were among the victims, and in some cases they appear to have been the only victims.<sup>2</sup> In most instances private houses, churches, cathedrals, hospitals, and historic monuments were among the objects destroyed, and it was charged that in a number of instances the bombardment was directed especially against them.<sup>3</sup> The Germans were also charged with bombarding in October, 1914, the "open" towns of Belgrade, Chabatz, and Losnitza in Servia. It was admitted that Belgrade contained an ancient Turkish fortress, but it is alleged to have been without modern defences. Professor Reiss of the University

<sup>1</sup> A detailed account of the bombardment of Saint-Dié may be found in Allier, *Les Allemands à Saint-Dié*, ch. II.

<sup>2</sup> Thus in the village of Houplines which was bombarded on December 15, 1914, fifty civilians were killed; at Béthune the only victims were non-combatants; at Dompierre-aux-Bois forty civilians are said to have been killed during the course of a bombardment, men, women, and children having been exposed for five days to an almost continuous rain of bombs and shells; the picturesque village of Gerbevillier was reduced to a heap of ruins.

<sup>3</sup> One of the most frightful cases of bombardment occurred on March 29, 1918, when a bomb thrown by a long-range German cannon fell upon a church in Paris and killed some seventy-five persons and injured a hundred others who were assembled for purposes of worship. Most of the victims were women and children. Cf. *New York Times* of March 31, 1918, and 45 *Clunet*, 623. A description of the scene following the falling of the bomb is contained in a report of the American ambassador to the secretary of state, *Official Bulletin*, April 3, 1918. According to statistics compiled by the French government, 168 shells were fired into the city of Paris from German long-range cannon, 196 persons being killed and 417 wounded. *New York Times*, December 19, 1918.

of Lausanne, who visited the city shortly after its bombardment, says the fortress was nothing but a historical monument. Sixty public buildings and 640 private houses, he asserts, were damaged or destroyed, among them the university, the national museum, the old royal palace, the State tobacco manufactory, and the Russian and British legations. The private houses destroyed or damaged, he adds, were not for the most part situated near the government buildings, from which he concludes that no attempt was made by the enemy to distinguish between buildings which were properly objects of bombardment and those which were not. At the time of his inquiry, twenty-five civilians had been killed and 126 wounded. In Chabatz, an "open town of no strategic importance," 486 houses were destroyed or damaged.<sup>1</sup>

§ 270. **Charges against the Entente Powers.** Countercharges in respect to unlawful bombardments were of course made against the Entente allies. The Germans accused the Russians of "treacherously bombarding" the unfortified town of Memel. The Russians defended their conduct on the ground that the civilian population of the town took part in the military operations, "thereby compelling the Russians to adopt exceptional measures which were unavoidable under the circumstances."

The British and French were also charged with bombarding Gallipoli in April, 1915, killing numerous women and children, although the town "could not properly be regarded as fortified and was a place of no military importance."<sup>2</sup> They were likewise charged with bombarding the "open" towns of Dar-es-Salaam, Victoria, and Swakopmund in German Southwest Africa.

§ 271. **Provisions of the Hague Conventions regarding Land Bombardments.** The law governing land bombardments is found in articles 25 and 26 of the Hague convention of 1907 respecting the laws and customs of war on land. Article 25 reads as follows: "It is prohibited to attack or bombard by any means whatsoever, cities, villages, habitations or buildings which are undefended." Article 26 declares that "The commander of the attacking troops before commencing a bombard-

<sup>1</sup> Cf. his brochure, *How Austria-Hungary Waged War*, pp. 11-12. Cf. also Maccas, *op. cit.*, p. 59.

<sup>2</sup> *Norddeutsche Allgemeine Zeitung*, October 26, 1915.

ment, except in cases of assault, must do all in his power to advise the authorities of the intended bombardment." It will be noted that article 25 forbids the bombardment of *undefended* places (*qui ne sont pas défendus*), but it does not undertake to define the term "undefended." When is a place "defended" and when is it "undefended"? There is a general agreement that the terms "undefended" and "unfortified" are not synonymous, and that a place may be unfortified and yet defended, in which case it may be bombarded if the defences are used.<sup>1</sup> Conversely, a town may be fortified, and yet no attempt may be made to defend it. In that case no military purpose would be subserved in bombarding it, and its bombardment would be inexcusable.<sup>2</sup> Again, a town may be "defended," but the means of defence may not be employed to resist the entrance of the invader. In that case the town is not liable to bombardment, since the enemy may enter it unopposed.

If, however, means are taken to prevent the enemy from entering and occupying it, it can hardly be said to be undefended even if it be without fortifications or ramparts. Westlake aptly remarks that "the price of immunity from bombardment is that the place shall be left open for the enemy to enter."<sup>3</sup> What is really required, says Rolin Jaequemyns, is that before bombarding a place, the attacking belligerent must satisfy himself that there is no intention on the part of the town or city

<sup>1</sup> Cf. Holland, *Laws and Customs of War*, p. 30; also his *Letters on War and Neutrality*, pp. 103-104; Spaight, *op. cit.*, p. 158; Pillet, *Les Lois Actuelles de la Guerre*, p. 104; Bonfils, *Manuel*, § 1081; Higgins, *Armed Merchantmen*, p. 49; *Actes et Documents de la Seconde Conférence 1907*, Vol. III, p. 356.

<sup>2</sup> At the Conference of 1907 the Dutch and American proposals prohibited the bombardment of "non-fortified" towns, villages, etc. But the word "non-fortified" was struck out, thus indicating that in the judgment of the Conference the existence of fortifications did not of itself constitute a sufficient excuse for bombardment if the fortifications were not defended. Whether a place is "defended," and not whether it is fortified, was therefore made the test of its liability to bombardment. A good review of the discussions on this point at the Conference may be found in Lémonon, *op. cit.*, pp. 503-525.

<sup>3</sup> *International Law*, Vol. II, p. 315. Cf. also Bonfils, § 1082, and Merignhac, *op. cit.*, p. 177, who make resistance by the inhabitants rather than the presence of the means of defence the test of liability to bombardment. Merignhac justifies the bombardment of Châteaudun by the Germans in 1870, because although it was an "open" city, it was energetically defended by *francs-tireurs* and the national guard; but he condemns the bombardment of Alexandria by the English in 1882, because the town was undefended, and the inhabitants offered no resistance.

to defend itself.<sup>1</sup> Fauchille adopts the same view.<sup>2</sup> Even a fortified town which makes no attempt to defend itself against occupation by the enemy ought not to be bombarded any more than an unfortified city which offers no resistance, since it can be taken without recourse to bombardment. In that case the enemy has only to occupy it, after which he may destroy the fortifications, installations, and other places of military value.

Article 25 of the Hague convention forbids, as stated above, the bombardment of places which are not defended (*qui ne sont pas défendus*). Is this the same thing as places which do not defend themselves (*qui ne se défendent pas*), but which have the means of defence? Clearly not. To remove doubt as to this, the Institute of International Law in its manual of the laws of war substitutes the words *qui ne se défendent pas* for the words *qui ne sont pas défendus*,<sup>3</sup> thus making actual defence rather than the possession of the means of defence the test of liability to bombardment, as Fauchille suggests. This would seem to be a more rational and logical test than the mere presence or absence of fortifications. In fact, a town may possess fortifications and yet lack artillery or troops with which to make a defence.

Does the mere presence of troops in a town make it a "defended" place? The American, British, and German manuals lay down the rule that the presence of a military force in a town, or even the passing through it of troops, gives it the character of a defended place, apparently even if they offer no resistance to the entrance of the enemy.<sup>4</sup> Again, this does not impress one as being a reasonable or logical test. The more reasonable test, as stated above, would seem to be the fact of resistance or submission.

Does the presence of supplies of military value to the enemy, or the presence of railway establishments, telegraphs, or bridges

<sup>1</sup> *Revue de Droit Int.*, Vol. III, p. 298. The French *Manuel* (art. 63) lays down the same principle. The test of the liability of a place to bombardment, it says, is not whether it is fortified, but whether it actually offers resistance. The moment it opens its gates to the enemy, it ceases to be liable to bombardment, whether it is fortified or not.

<sup>2</sup> *Bombardement Aérien, Rev. Gén. de Droit Int.*, Vol. 24, pp. 59-60.

<sup>3</sup> *Annuaire*, 1913, pp. 533-534.

<sup>4</sup> *American Rules of Land Warfare*, art. 214; *British Manual*, art. 119; Carpentier's trans. of the *Kriegsbrouck im Landkriege*, p. 43.

in a town constitute in itself a sufficient excuse for bombarding it? The British and American manuals answer the question in the negative; the German manual adopts the contrary view.<sup>1</sup>

In the case of a fortified town, is the attacking belligerent required to confine his bombardment to the fortifications? The authorities are generally agreed that he is not so restricted, since in many cases bombardment would be impossible if this requirement were insisted upon. In practice, belligerents have generally acted on this principle in the wars of the past,<sup>2</sup> and private houses and even hospitals, churches, museums, and educational institutions have frequently been damaged or destroyed, even when they were situated at a considerable distance from the fortifications.<sup>3</sup> Sometimes this appears to have been done deliberately and wantonly without any apparent attempt

<sup>1</sup> British *Manual*, art. 118; American *Rules*, art. 212, note 1. The American *Rules* add that if it is necessary to destroy such objects, it must be done by other means than bombardment. The German manual remarks, somewhat cynically, that the Hague prohibition regarding the bombardment of open towns and villages is "superfluous," because "the history of modern wars hardly knows of any such case" (Carpentier's trans., p. 50). In short, practically every town within the enemy's lines is a "defended" place and may, therefore, be bombarded. This view reduces the Hague prohibitions virtually to a nullity and is contrary to the views of practically all the authorities as to what constitutes "defence."

<sup>2</sup> Cf. some instances cited by Spaight, pp. 164-166. The British and German official manuals are in agreement on this point. The British manual (art. 122) says: "No legal duty exists for the attacking force to limit bombardment to the fortifications or defended body only. On the contrary, destruction of private and public buildings by bombardment has always been, and still is, considered lawful, as it is one of the means to impress upon the local authorities the advisability of surrender." Cf. also Phillimore, *Bombardments*, in *Pubs. of the Grotius Society*, Vol. I, p. 63. Is this not, however, bombardment for "psychological pressure," which has been strongly condemned by some writers, such as Bluntschli and Spaight? The British manual also adds that even a town which is defended by detached forts at a distance from the town is liable to bombardment, "for the town and forts form an indivisible whole." Some writers, it adds, hold a contrary view, but the general practice has been in accordance with the rule stated (art. 122). The American manual (art. 214) lays down the same rule. Cf. also Fauchille, *Le Bombardement Aérien*, 24 *Rev. Gén. de Droit Int. Pub.* (1917), p. 56, who remarks that a defended place may be bombarded by land or sea, in which case the bombardment need not be limited to particular parts, but may be directed against the sections inhabited by the civil population, subject to the limitation that the attacking party must spare so far as possible buildings devoted to religion, arts, science, and philanthropy, historic monuments, hospitals, and places where the sick and wounded are gathered. The German manual (Carpentier's trans., p. 43) remarks, that since the town and its fortifications constitute an inseparable unity, "the bombardment will not limit itself to the actual fortifications, but will and must extend over the whole town."

<sup>3</sup> Numerous instances are referred to by Spaight, *op. cit.*, pp. 162 ff.



to distinguish between such buildings and those which are recognized as objects of legitimate attack.

§ 272. **Bombardments without Notice.** During the recent war a common complaint was that the bombardments alleged were made without due notice. Article 26 of the Hague *règlement* of 1907 respecting the laws and customs of war, as stated above, requires the officer in command of an attacking force to do all in his power to warn the authorities before commencing a bombardment, *except in cases of assault*. By "assault" here is meant a surprise attack. This exception to the general requirement is based on the assumption that an attack is more likely to be successful if it partakes of the character of a surprise, and therefore the general rule may be overridden by military considerations. Ordinarily, however, bombardments are not in the nature of surprise attacks, and, in any case, it is hard to see what advantage it would be to the inhabitants unless the notice were accompanied by permission to leave — a permission which was generally refused by the Germans in the Franco-German war of 1870-1871.<sup>1</sup> Considerations of humanity, however, to say nothing of the Hague rule, require that belligerents should give warning, especially where the population includes non-combatants, and that an opportunity should be allowed the latter to leave.

The manual of the German general staff, however, emphatically repudiates the rule of the Hague convention and declares that preliminary warning is not obligatory in any case,<sup>2</sup> nor is

<sup>1</sup> Cf. Spaight, *op. cit.*, pp. 172 ff., for a review of the practice in former wars. Recent practice has generally been to give warning and to allow the non-combatant population sufficient time to leave. Bluntschli (*op. cit.*, § 554) criticised the German practice in 1870-1871. Rolin Jaquemyns, who defended the German bombardment of various French cities in 1870-1871, maintained that the Germans had a right to bombard Paris, since it was encircled by a ring of fortifications; but he seems to think that their offence consisted in the omission to summon it to surrender and in failing to give notice and an opportunity to the civil population to leave. The provisional government addressed a protest to foreign governments against the bombardment of the city without notice, the indiscriminate shelling of hospitals, and the "premeditated massacre of women and children." Cf. the text of the protest in *Rev. Gén. de Droit Int. Pub.*, Vol. III, pp. 305 ff.

<sup>2</sup> Carpentier, p. 45. The claim that notice must be given in advance, the German manual says, is "absolutely contrary to the necessities of war and must be rejected by the soldiers." Moreover, the instances in which notice has been given voluntarily do not prove the existence of the obligation. The besieging commander must determine for himself whether the giving of preliminary notice will have the effect of endangering the success of his operations. If he is satis-

a belligerent bound to allow the non-combatant population to leave, the opinions of the jurists and the exceptional practice of the past to the contrary notwithstanding. The British manual<sup>1</sup> adopts the Hague rule regarding the obligation to give notice, but like the German manual it declares that there is no rule which compels a belligerent to allow "all the non-combatants, or even women, children, the aged, sick and wounded, or subjects of neutral powers to leave the besieged locality."<sup>2</sup> The French manual likewise adopts the rule of the Hague convention, although in the case of cities surrounded by a ring of detached fortifications it allows the commander to bombard the fortifications without previous notice, but not the city itself.<sup>3</sup> Article 216 of the American *Rules* requires preliminary notice "whenever admissible," so that non-combatants, and especially the women and children, may be removed before the bombardment commences; but it adds that failure to give such notice is no infraction of the common law of war, since surprise may be a necessity.

As stated above, the more humane practice of recent wars and the preponderance of juristic opinion are in favor of preliminary warning and the granting of permission to the non-combatant population to leave before the beginning of a bombardment.<sup>4</sup> Likewise, there is a substantial unanimity of opinion that belligerents should, so far as possible, confine their attacks to the fortifications, military works, depots, etc., and do all in their power to spare private houses, hospitals, educational and religious institutions, and the like. The belligerent who makes no attempt to distinguish between the two

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fied it will have this effect, he is not bound to give warning; if, on the contrary, he has nothing to fear from giving the notification, "conformity to the exigencies of humanity" requires that it should be given. In short, the duty of the commander in this as in other cases is determined not by considerations of humanity, but by military considerations solely.

<sup>1</sup> Art. 124.

<sup>2</sup> Art. 125. The British manual, however, refers approvingly to the action of the Japanese commander in allowing women, children, and the subjects of neutral powers to leave Port Arthur in 1904, and so do the American *Rules* (p. 68).

<sup>3</sup> *Les Lois de la Guerre Cont.*, art. 64. Le Fur approves this view, *Rev. Gén. de Droit Int. Pub.*, 1898, p. 777, and apparently also Politis, *ibid.*, 1897, p. 687.

<sup>4</sup> It is stated in some of the accounts that during the late war the civil population of Arras and Nancy were allowed by the Germans to leave before the beginning of the bombardment.

classes of objects, and who bombards indiscriminately a whole town or city, destroying wantonly and deliberately private houses situated far from the fortifications and killing unoffending non-combatants whom he compels to remain in the city, violates the elementary principles of humanity as well as the spirit and the letter of the international conventions.

§ 273. **Naval Bombardments.** In a number of instances during the recent war English coast towns were subjected to bombardment by German naval forces. The first case to attract widespread attention and one which was denounced both in England and America as an act of savagery, was the bombardment by a squadron of German cruisers of the towns of Scarborough, Hartlepool, and Whitby on December 16, 1914. Taking advantage of a foggy night, three swift-sailing German craft, accompanied by three armored cruisers, eluded the British blockade and descended upon the British coast in the early morning hours while the inhabitants were for the most part still in bed, and without warning or notice to the local authorities, proceeded to bombard the three towns mentioned. At Scarborough 51 persons are reported to have been killed and 200 wounded; at Hartlepool 55 were killed and 115 wounded, and at Whitby 2 were killed and 2 wounded. At Scarborough 150 houses are said to have been demolished or damaged; at Hartlepool 200 houses were damaged, and a number of ships in the harbor were wrecked, while at Whitby a number of buildings, including an ancient abbey, were injured. Practically all the victims were non-combatants, many of them being women and children.<sup>1</sup> Similar "raids" on Lowestoft, Yarmouth, Ramsgate, and other English coast towns took place at different times during the years 1916 and 1917.<sup>2</sup>

<sup>1</sup> A majority of the victims at Hartlepool were reported to have been women and children. At this place 15 school children are said to have been killed by a single shell.

<sup>2</sup> Cf. the London weekly *Times*, May 5, 1916, and New York *Times*, April 28, 1917. Cf. also the letter of Mr. Balfour to the mayors of Lowestoft and Yarmouth, London weekly *Times*, May 19, 1916. During the raids on Lowestoft and Yarmouth in April, 1916, some one hundred and forty inhabitants, all of whom were non-combatants, men, women, and children, are said to have been killed. On April 26, 1917, a number of German destroyers appeared off the coast of Kent and without notice threw more than one hundred shells upon the town of Ramsgate. One man and woman were killed and three persons injured. Twenty-one private dwelling houses were reported to have been injured. On the night

§ 274. **Views and Practice as to Bombardment of undefended Coast Towns.** Are such acts as these forbidden by international convention, the customs of civilized warfare, or the principles of humanity, as was generally asserted in England and the United States? Formerly the bombardment of undefended coast towns was considered a lawful mode of warfare, and in practice it was resorted to long after the harsh rules of land warfare had been modified. But there were humane men who raised their voices against the practice. As early as 1844, when the Prince of Joinville of France recommended the bombardment of undefended English coast towns in the event of a war between England and France, the Duke of Wellington characterized it as a method of war which had been "disclaimed by the civilized portions of mankind."<sup>1</sup> In 1882 the French admiral Aube expressed the opinion that fleets would destroy the coast towns of the enemy, burn them and lay them in ruins, or at least hold them mercilessly for ransom.<sup>2</sup>

During the British naval manoeuvres in 1888 Professor Holland protested in a series of letters to the London *Times* against a manoeuvre in which the enemy was supposed to hold, subject to ransom, under threat of bombardment, certain towns, such as Liverpool, summer resort places, and the like. It was desirable, he said, that "our naval forces should be warned against any course of action in their conduct of mimic warfare which could be cited against us in case we should ever have to com-

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of September 5, 1917, Scarborough was again bombarded by a German submarine which fired thirty shells into the town. The only result was the killing of two women and a girl and the wounding of a few other persons. The railway station, a hotel, and some shops were struck and damaged. No military damage whatever was done. *New York Times*, September 9, 1917. On the night of January 14, 1918, Yarmouth was again bombarded by a German cruiser or submarine. During the course of the bombardment three persons were killed and ten injured. Most of the inhabitants were in bed at the time of the attack. No warning of the intended bombardment was given.

<sup>1</sup> Higgins, *The Hague Peace Conferences*, p. 352, and Holland, *Studies in International Law*, p. 101. "What but the inordinate desire of popularity," said the Duke of Wellington, "could have induced a man to write and publish such a production, an invitation and provocation to war, to be carried on in a manner such as has been disclaimed by the civilized portions of mankind." In 1871, Porto Chili was burned by a naval commander for refusing to comply with his demand for a money contribution. Such acts, says Holland (*Studies* p. 101), are stigmatized by public opinion as so barbarian that their perpetration in civilized warfare may be regarded as improbable.

<sup>2</sup> *Revue des Deux Mondes*, Vol. 50, p. 331.

plain of similar action on the part of a real enemy." Such acts, he added, would be contrary to the rules of international law, although he admitted that unfortified towns could be bombarded for refusal to comply with a demand for requisitions for the fleet, for refusal to pay a contribution in lieu thereof, and for certain other acts.<sup>1</sup>

In 1896 the Institute of International Law adopted a rule forbidding the bombardment of undefended and open towns by both military and naval forces.<sup>2</sup> Four years later this prohibition was incorporated in the United States naval code (article 4), which forbade the naval bombardment of unfortified and undefended towns, villages, or buildings in such towns, except where it was incidental to the destruction of military or naval establishments, munitions depots, and the like, and except for refusal of necessary supplies for the fleet, in which case due notice of the intended bombardment was required to be given.

§ 275. Provisions of the Hague Convention regarding Naval Bombardment. The question of naval bombardments was considered at length by the Second Hague Conference, and there was a general agreement among the delegates that unfortified and undefended towns should not be liable to bombardment save in exceptional cases.<sup>3</sup> The conclusions of the Conference were embodied in a convention, article 1 of which forbids the bombardment "by naval forces of *undefended* ports, towns, villages, dwellings or buildings."<sup>4</sup> It also forbids the bombardment of any place solely because automatic submarine con-

<sup>1</sup> Cf. his *Studies in International Law*, pp. 96 ff., and his *Letters on War and Neutrality*, pp. 99 ff. A similar view was expressed by Hall, *International Law*, p. 436. High naval officers of England, however, took issue with Professor Holland, and a committee of admirals appointed to report on "the feasibility and expediency of cruisers making raids on an enemy's coasts and unprotected towns for the purpose of levying contributions" expressed the opinion that such a mode of warfare was entirely legitimate and would no doubt be attempted by any maritime power with which Great Britain should find herself at war. But as Professor Holland pointed out, the British government by 1907 had so far departed from the views expressed by the admiralty in 1888 that it instructed its delegates to the Hague Conference that the "government consider the objection, on humane grounds, to the bombardment of unfortified towns as too strong to justify a resort to that measure, even though it may be permissible under the abstract doctrines of international law." *Letters on War and Neutrality*, p. 109.

<sup>2</sup> *Annuaire*, Vol. XV, pp. 145, 148.

<sup>3</sup> Cf. *Actes et Documents de la Seconde Conférence de la Paix*, Vol. III, pp. 655-659.

<sup>4</sup> Except for refusal to comply with demands or requisitions for necessary supplies for immediate use of the naval forces.

tact mines are anchored off the harbors.<sup>1</sup> Article 2, however, declares that military works, military and naval establishments, depots of arms or war material, workshops or plants which could be utilized for the needs of the hostile fleet or army, as well as war ships in the harbor, are not included in the above-mentioned prohibition. All such things are, therefore, legitimate objects of bombardment in naval warfare, even when found in undefended places. It will be noted that the naval convention here makes an exception to the rule of absolute prohibition in respect to land and aerial bombardments by allowing the bombardment by naval forces of the objects mentioned above.<sup>2</sup> The convention, however, requires naval commanders to give notice, followed by a reasonable time before proceeding to destroy such objects, unless for military reasons immediate action is necessary. The commander is also required to take all due measures that the town may suffer as little as possible, but it is expressly declared that he incurs no responsibility for unavoidable damage which may result from the bombardment of the objects mentioned above. Finally, article 6 makes it the duty of the commander to do his utmost to warn the authorities before commencing the bombardment, *if the military situation permits*. This convention, like most of the others adopted by the second Hague convention, was not technically binding on any of the belligerents during the recent war, because it was never ratified by all of them in accordance with the general participation clause. Nevertheless, the prohibition in respect to the bombardment of undefended towns was not a new rule, but was merely declaratory of the existing law and practice and was, therefore, in fact as binding as any other well-established rule of customary law.<sup>3</sup>

<sup>1</sup> There was considerable opposition, however, to this provision on the ground that it seemed illogical to treat a town defended by submarine mines as inviolable when one defended by land batteries was not. *Actes et Documents*, Vol. III, 655 ff.

<sup>2</sup> It was pointed out in the subcommittee charged with reporting on the question of naval bombardments that in the case of land bombardments a belligerent would not always need to destroy such objects, since he might seize the town without resorting to bombardment, whereas in the case of naval warfare he could not land a force for this purpose, and that it might be necessary for him to withdraw quickly. Unless, therefore, he were allowed to destroy them by means of bombardment, his operations might be without effect. *Actes et Documents*, Vol. III, pp. 357, 548. Cf. also Fauchille, article cited, p. 58, note 1.

<sup>3</sup> Cf. Scott, "Bombardment by Naval Forces," *Amer. Jour. of Int. Law*, Vol. II, p. 291; Fauchille, *Le Bombardement Aérien*, *Rev. Gén. de Droit Int. Pub.*, Vol.



§ 276. **Interpretation of the Hague Rules.** Admitting the binding effect of the convention, we find ourselves in the face of a controversy, particularly in regard to the provision which relieves commanders from the obligation to give notice in case the military situation does not permit, and as to the meaning of the word "undefended." The commander might always allege as an excuse for refusing to warn the inhabitants that military exigencies made it inexpedient, and it would be difficult to deny him the right to be the judge. Nevertheless, as Lémonon observes, the latitude thus allowed does not authorize him to violate the most elementary rule governing bombardments.<sup>1</sup> The meaning of the term "undefended" in the naval convention is of course the same as that in the convention respecting land warfare. The Germans in their justification for the bombardment of the English coast towns during the late war took the position, however, that the presence of a few soldiers, some barracks, a depot of supplies, or a land battery in a town makes it a "defended" place and therefore renders it liable to bombardment. Indeed, it does not appear that they paid any attention at all to the distinction between "defended" and "undefended" towns. This extreme view is manifestly contrary to the spirit of the convention. It would seem that in order to constitute defence in any real sense against attack by naval forces, a place must be protected by barricades, fortifications, or earthworks, or equipped with batteries capable of enabling it to resist attack. Nevertheless, while the right of a naval commander to bombard a town not so defended can hardly be admitted, his right to bombard military works, depots, and war material generally in such towns is clearly recognized, and he incurs no responsibility for incidental damages caused thereby.

The exceptions to the general rule which the convention makes and the exemptions which it accords to naval commanders in case of military necessity — a term which is not defined by the convention, and the interpretation of which remains in the last analysis largely with the attacking belligerent — certainly leave a large discretionary power in the hands of commanders.

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24, pp. 58 ff., and Phillimore, "Bombardments," in *Pubs. of the Grotius Society*, Vol. I, pp. 61 ff.

<sup>1</sup> *La Seconde Conférence de la Paix*, p. 521.



The value of the convention, therefore, depends largely on the spirit in which it is observed.

§ 277. **The German Contention as to the Right to Bombard English Coast Towns.** In the light of the practice and the conventions thus reviewed, we may now examine the question of the legitimacy of the bombardment of the English coast towns during the recent war. The English contention was that Scarborough and Whitby were not only unfortified, but were also undefended, and that Hartlepool was defended only in a technical sense, if at all, its defences consisting only of the presence in the town of a feeble battery. Scarborough, in particular, was mainly a summer resort town of no military or naval importance whatever. The inhabitants of all three places consisted of peaceful civilians, and except the solitary battery at Hartlepool, there were no objects or material of military or naval character in either of them.

The Germans, however, asserted that Hartlepool was in fact fortified, and that Whitby and Scarborough, and indeed all English coast towns, were defended either by regular troops, coast guns, or volunteers and therefore were not immune from bombardment.<sup>1</sup> Moreover, the purpose of the attack was merely to destroy the signalling stations, harbor constructions, military buildings, coast batteries, and other legitimate objects of attack, and the injury inflicted upon private property and upon the civil population was unavoidable and incidental, for which the attacking belligerent under the terms of the Hague convention was not responsible.<sup>2</sup>

As to the obligation to give notice of the attack, that was

<sup>1</sup> "The German Government," said Sir Edward Grey in his note of February 19, 1915, to the American government regarding the case of the *Wilhelmena*, "have in public announcements claimed to treat practically every town or port on the English east coast as a fortified place and a base of operations. On the strength of this contention they have subjected to bombardment the open towns of Yarmouth, Scarborough and Whitby, among others." The *Norddeutsche Allgemeine Zeitung* of January 4, 1915, asserted that the bombardments in question were strictly in accord with the terms of the Hague convention. Hartlepool, it said, was listed in the official British monthly army list as one of the "coast defences," all of which places were occupied by British forces; Scarborough, although not mentioned in the list as "fortified," nevertheless had at the north end of the town a rampart protected by a battery, also barracks, a wireless station, and a number of quick-firing guns, while Whitby had a coast guard station which was under the control of the admiralty.

<sup>2</sup> Cf. the *Berliner Zeitung* of January 8, 1915.

impossible without imperilling the success of the operations, and consequently the commander was relieved by the Hague convention from the duty to give warning.<sup>1</sup> Finally, so the Germans argued, the attacks could be defended as a legitimate act of reprisal against the enemy for their aerial attack upon the unfortified town of Freiburg on December 9, 1914, the dropping of bombs on the unfortified island of Langeoog on December 25, 1914,<sup>2</sup> for the bombardment without notice of the open towns of Dar-es-Salaam in Turkey, of Victoria and Swakopmund in German Southwest Africa, and of certain towns on the Belgian coast,<sup>3</sup> and for the attempt of the allies to reduce the German people to starvation by their alleged unlawful restraints upon commerce with Germany.<sup>4</sup>

§ 278. **The German Arguments Analyzed.** As is well known, the German government attempted to justify the larger number of its numerous violations of international law on the ground of reprisal for acts alleged to have been committed by the enemy, and when these were lacking, it could always invoke the "inhuman and unlawful" starvation measures of the allies. But the cutting off of the enemy's food supply is not an unlawful belligerent measure against which reprisals may be resorted to, and even if the charges against the British and French for bombarding open towns of Germany and her allies were true, the injury to the non-combatant population of those towns was so inconsiderable that it afforded no justification for an act of reprisal which was attended with so great a loss of life and injury to peaceful and unoffending inhabitants as resulted from the bombardment of the English coast towns. Likewise, if it were true that there was in fact an old battery in one of the towns,

<sup>1</sup> The German offence in neglecting to give warning was of course not the principal offence; it was rather the act of bombarding places which were not liable to bombardment. Their acts, therefore, would have still been unlawful, even if they had given warning.

<sup>2</sup> *Norddeutsche Allgemeine Zeitung*, January 22, 1915.

<sup>3</sup> Statement of Bethmann-Hollweg to a representative of the Associated Press, January 25, 1915.

<sup>4</sup> Referring to the loss of life resulting from the bombardment of the English coast towns, the *Norddeutsche Zeitung* of January 22, 1915, said: "We regret deeply that on this occasion civilian life has been sacrificed. But the German forces cannot be deterred by such possibilities from taking all possible means compatible with international law, of fighting an enemy that shuns no means whatever, whether in accordance with international law or not, for the destruction of our entire economic life."

some barracks with possibly a few soldiers in another, and a coast guard station and a wireless telegraph installation in some or all of them, it cannot be said that their presence gave to the towns the character of "defended" places in any other than the most technical sense of the term, if indeed at all. If the presence of such objects in a town makes it a "defended" place, there are few or no coast towns in England or elsewhere which are "undefended," and consequently the prohibitions of the Hague convention in respect to naval bombardments are quite illusory. Had the German commanders confined their bombardments to these objects, if there were such, they would have been within their rights, even though incidental damage had resulted to the property and lives of the civil population. But they proceeded on the theory that since there were objects of legitimate attack in the towns in question, it was lawful to bombard the entire town and destroy everything and everybody — the civilian population as well as the troops if there were any, private houses, churches, and schools as well as coast guard stations, wireless installations, and other objects of military value. No opportunity was given the inhabitants to leave and save themselves, and no effort whatever was made to confine the bombardment to the legitimate objects of attack. The conclusion would seem to be warranted that if a naval squadron may lawfully descend in the dead of night upon the coasts of an enemy and suddenly and without warning proceed to destroy peaceful summer resort towns, unfortified or otherwise undefended in any substantial sense, killing and wounding hundreds of the civil population and destroying private houses when no military advantage is gained except to strike terror into the inhabitants, it is difficult to conceive a case of unlawful bombardment.<sup>1</sup> If such bombardments are not forbidden by the Hague convention, it is a fair question to raise whether any bombardments are forbidden. We may not agree with the verdict of the coroner's jury at the inquest over the victims at Scarborough that they met their death as the result of a "murderous attack," but it is hard to avoid the conclusion that the act was contrary to the elementary rules of honorable warfare and in violation of the spirit if not the express terms of the Hague convention.

What Lord Evelyn said in 1694 of the burning of Dieppe and

<sup>1</sup> Cf. Fauchille, *Le Bombardement Aérien*, *op. cit.*, Vol. 24, p. 63.

Havre by Lord Berkeley, that "this manner of war . . . is exceedingly ruinous, especially falling on the poor people and does not seem to tend to make a more speedy end of the war, but rather to exasperate and incite to revenge,"<sup>1</sup> may be said with equal truth of such measures as the bombardment of the undefended coast towns of England by the Germans during the recent war.

<sup>1</sup> Quoted by Hall, *International Law*, 5th ed., p. 533.

## CHAPTER XVIII

### *DESTRUCTION OF HISTORIC MONUMENTS, BUILDINGS, AND INSTITUTIONS ESPECIALLY PROTECTED BY THE LAW OF NATIONS*

§ 279. Rules of the Hague Convention; § 280. Early Practice; § 281. More Recent Examples of Spoliation; § 282. Burning of the University of Louvain; § 283. The German Defence; § 284. The German Defence Analyzed; § 285. Destruction of the Cathedral of Rheims; § 286. The German Defence Analyzed; § 287. Destruction of Other Edifices and Historic Monuments in Belgium and France; § 288. Still Other Examples of Vandalism; § 289. Destruction of Historic Monuments and Objects of Art in Italy; § 290. Observations on the Law and German Practice.

§ 279. Rules of the Hague Convention. Among the most regrettable violations of international law during the recent war — one for which adequate reparation in many cases was impossible — was the destruction on a large scale of buildings which fell within the category of historic monuments and of institutions devoted to science, art, education, religion, and charity. Here as in so many other cases the Germans were the principal offenders, and in many instances their conduct was inexcusable and in flagrant contravention of the rules laid down in the Hague conventions.

Article 56 of the Hague conventions of 1899 and 1907 in respect to the laws and customs of war on land declares that the property of communes, of institutions dedicated to religious worship, charity, education, art, and science, even when belonging to the State, shall be treated as private property. All seizure of, and destruction or intentional damage done to such institutions, historical monuments, works of art or science is forbidden and should be made the subject of legal proceedings.<sup>1</sup> Article 27 of the same convention is as follows:

“In sieges and bombardments all necessary steps shall be taken to spare, as far as possible, buildings devoted to religion, art, science, and

<sup>1</sup> Article 8 of the Brussels Act of 1874 contained the same prohibition in almost identical language.

charity, historic monuments,<sup>1</sup> hospitals, and places where the sick and wounded are kept, provided they are not used at the same time for military purposes. The besieged should indicate these buildings or places by some visible signs, which shall be previously notified to the assailants.”<sup>2</sup>

§ 280. **Early Practice.** During the wars of ancient and medieval times no special sanctity was accorded to such buildings or institutions, and indeed in later times they were frequently the object of wanton desecration and destruction.<sup>3</sup> Thus during the early Italian wars Charles VIII and Louis XII seized and appropriated the contents of libraries,<sup>4</sup> and during the Thirty Years' war the library of the Elector Palatine was seized and its contents sent to Rome, an act which aroused the indignation of Gustavus Adolphus and caused him to resort to reprisals in kind.<sup>5</sup> Happily, during the eighteenth century the spoliation of art museums and libraries fell under condemnation and was rarely resorted to thereafter. The last notable instance of the old practice was the seizure by Napoleon of the art treasures of Italy and the removal of them to Paris, where they were placed in the Louvre. These spoliations were generally condemned, and when the allies entered Paris in 1815, the works of art thus appropriated by Napoleon were seized and restored to their rightful owners.<sup>6</sup>

§ 281. **More Recent Examples of Spoliation.** While this appears to have been the last flagrant example of wholesale spoliation of art galleries, more recent instances of the destruction of public buildings, historic monuments, museums, churches, hospitals, and educational institutions have not been wanting. During the Crimean war the museum of Kertsch, formerly a Greek temple, was burned with the rest of the town by the English and French. In 1860 the British and French forces destroyed the Chinese Imperial summer palace to “awe the Chinese into respect for British power.”<sup>7</sup> During the American

<sup>1</sup> The words “historic monuments” were not mentioned in the convention of 1899, but were added in 1907.

<sup>2</sup> This rule is practically the same as article 17 of the Brussels Act of 1874.

<sup>3</sup> The ancient custom of seizing mosques, temples, and art treasures is reviewed by Calvo, Vol. IV, § 2214.

<sup>4</sup> Bordwell, *The Law of War*, p. 61.

<sup>5</sup> Bordwell, p. 62; Woolsey, *Int. Law*, 6th ed., p. 222.

<sup>6</sup> Oppenheim, *Int. Law*, Vol. II, p. 140.

<sup>7</sup> “This act,” observes Rivier, Vol. I, p. 320, “was unworthy of the two European nations which everybody in the Orient considered as the advance guard of

Civil war the Virginia military institute at Lexington and most of the professors' houses were burned by General Hunter of the Federal army.<sup>1</sup> During the Franco-German war of 1870-1871 the library of the University of Strasburg, with 400,000 volumes and 2400 manuscripts, an art gallery, and various public buildings were destroyed, and the tower of the cathedral was burnt.<sup>2</sup> During the same war the Abbey of St. Denis was battered to pieces by German shells,<sup>3</sup> a Gothic chapel at Toul was ruined, the churches of Longwy, Péronne, and Bitche were made heaps of stone and rubbish, and the Invalides, the Sorbonne, the Panthéon, Saint Sulpice, the College of Law, and several military hospitals of Paris were shelled during the bombardment of that city. But the Germans refrained from carrying away the art treasures of Versailles and took measures to protect them from theft or destruction.<sup>4</sup> At the outbreak of the war between Spain and the United States in 1898 the American government issued instructions forbidding the deliberate destruction of charitable, religious, and educational buildings, and no acts of this kind were in fact committed.<sup>5</sup>

Immediately preceding the outbreak of the Boxer rebellion in China in 1900 German troops looted the Chinese astronomical observatory at Peking, and certain instruments were sent to Potsdam, where they were kept on exhibition as trophies. In a letter of December 3, 1900, to the German general Count von

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civilization and progress. The contents of the palace, statuary, vases, jewelry, and works of art were seized before the destruction, and a joint commission was appointed to divide the choicest objects between Queen Victoria and Napoleon III. The proceeds from the sale of other objects were divided among the soldiers, the share of each amounting to about 100 francs." See Pradier-Fodéré, Vol. VI, p. 1107, and Nys, *Droit International*, Vol. III, p. 326.

<sup>1</sup> Gordon, *Reminiscences*, p. 302.

<sup>2</sup> Bonfils, § 1085, n. 2; Hozier, *The Franco-Prussian War*, Vol. II, p. 71, and Halleck, *op. cit.*, p. 82. Speaking of the destruction of the Strasburg library Spaight (p. 186) remarks that "it is hardly a fanciful anticipation to say that this great world-loss will make the war of 1870-1871 memorable when the politics that led to it and the names of the battles and leaders are forgotten." Sir Henry Hozier, historian of the war, says that "since the apocryphal burning of the library of Alexandria, perhaps no equally irreparable loss has occurred." The German justification for the bombardment of the cathedral of Strasburg was that the French had installed on the tower an observatory for the artillery officers. *Revue de Droit Int. et de Lég. Comp.*, Vol. III, p. 303.

<sup>3</sup> Bonfils, § 1085, n. 2. <sup>4</sup> Spaight, pp. 181, 186, and Bonfils, § 1085, n. 2.

<sup>5</sup> Benton, *International Law and Diplomacy of the Spanish-American War*, p. 161.



Waldersee, the American general Chaffee complained of the conduct of the German troops and informed Count von Waldersee that the American government would "vehemently denounce an officer of its service who should enter upon spoliation of this sort," and that it would "sincerely regret to learn that any nation with which it coöperated to relieve the besieged legations in Peking, authorizes or permits its troops to injure or remove any instruments or other parts of the observatory." General Chaffee felt obliged, therefore, to protest and notified Count von Waldersee that he would inform his government of the fact. In a communication of December 31, 1900, von Waldersee replied, rather curtly, to General Chaffee's protest and informed him that the protest had "impressed him most unfavorably, not only in respect to its form but also as to its substance."<sup>1</sup> No defence of the act appears ever to have been made by the German commander or by his government. The treaty of peace between Germany and the Allied powers in 1919 required Germany to restore the astronomical instruments thus taken from Peking.

§ 282. **Burning of the University of Louvain.** During the recent war there appears to have been no wholesale spoliation of public art galleries, libraries, or museums, such as was common in earlier wars, but many buildings and historic monuments whose sanctity and immunity are well established by the customs of civilized warfare as well as by the Hague conventions were seriously damaged and in some cases destroyed, either wantonly or as an unavoidable incident of military operations. In a good many cases, also, works of art appear to have been seized from private collections and taken to Germany.

The most regrettable and flagrant instance of what many persons considered to be "the crowning infamy" of the Germans was the burning in September, 1914, of the University of Louvain, including its library with its priceless collection of books, manuscripts, and scientific collections.<sup>2</sup> This venerable

<sup>1</sup> The correspondence between the two generals was given out by the United States war department in November, 1917, and was printed in the *New York Times* of November 14. Cf. also several letters from eye-witnesses to the conduct of the Germans, in the *Times* of November 15 and 16, 1917.

<sup>2</sup> The library contained about three hundred thousand volumes, many of them being rare and ancient editions, many pamphlets and documents relating to the history of the country, about five hundred manuscripts, and various minia-

institution was one of the oldest in Europe, having been founded in the early part of the fifteenth century, and was long one of the most famous centres of learning in western Europe. At the time of its destruction it was the most famous Catholic university in the world. Associated with its history were the names of some of the leading scholars of Europe since the Reformation. Its history and traditions occupied a place in the national life of the Belgian people not unlike those of Oxford and Cambridge in the life of the English people.<sup>1</sup> The entire collection of books, manuscripts, and works of art, save a small portion of the archives — official correspondence from 1629 to 1635 which had been borrowed by one of the professors — was destroyed. The hôtel de ville, the Gothic church of St. Peter, both noble examples of "historic monuments," the latter a veritable museum of art treasures, along with various other buildings whose character entitled them to immunity, were destroyed or seriously damaged.<sup>2</sup>

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tures and works of art. Cf. the report of J. M. Delannoy, the librarian of the university, published in *The Case of Belgium*, p. 45. According to the *Dial* (October 16, 1915) a catalogue of the manuscripts published in 1641 enumerated among others the chronicles of the dukes of Brabant, 1260-1555, and a manuscript written by Thomas à Kempis in his own hand. There were also many highly illuminated prayer books, rare Flemish bindings of the sixteenth and seventeenth centuries and beautiful editions of Horace, Ovid, Cicero, and other classical writers. The library building was itself a "historic monument" with its exquisite *salle des perdus* and its *salle des portraits*, the latter of which contained a collection of the portraits of the most distinguished professors and benefactors of the university during its early history. Cf. also Lettenhove, *La Guerre et les Œuvres d'Art en Belgique*, p. 87.

<sup>1</sup> Cf. Sarolea, *How Belgium Saved Europe*, p. 153.

<sup>2</sup> Chambry in his book, *The Truth about Louvain* (p. 92), enumerates the following "public monuments" which he says were burnt at Louvain: the ancient collegiate church of St. Pierre, the large Halls, the library of the university, the theatre, the concert hall *de la table ronde*, and the academy of fine arts. Cf. also a book published under the direction of the Belgian government entitled *L'Armée Allemande à Louvain en Août 1914 et le Livre Blanc Allemand* (1917), pp. 29 and 139. This work adds to the list of the buildings destroyed, the commercial and consular school and the palace of justice. Some of the buildings, notably the church of St. Pierre, however, appear not to have been totally destroyed. Professor Dupriez of the University of Louvain, who was an eye-witness to the burning of the library, points out in a letter to the *New York Times*, dated October 11, 1915, that the burning occurred late at night after the employees had left the library, and that the German authorities, having forbidden the citizens from appearing on the streets after 8 P.M., refused to allow those who attempted to come to the assistance of the Germans, to approach the building with a view to extinguishing the fire. Professor Dupriez further denies the German allegation that the fire which destroyed the cathedral was accidentally carried there from neighboring houses that were afire. He says, "I saw with my own eyes the

Belgian writers also charge that the Germans carried away many valuable works of art.<sup>1</sup>

The news of the burning of the university and other historic edifices aroused a feeling akin to horror throughout the civilized world. The British prime minister in his Guildhall speech of September 4, 1914, characterized it "as the greatest crime committed against civilization and culture since the Thirty Years' war — a shameless holocaust of irreparable treasures lit up by blind barbarian vengeance."<sup>2</sup> This characterization was fairly typical of opinion in neutral countries.

§ 283. **The German Defence.** The German authorities placed the responsibility upon the inhabitants of Louvain, "who by their acts of hostility and especially by having fired upon the German troops, compelled the latter to adopt severe preventive measures to avoid a repetition of the hostile acts." "The German troops," we are told, "set fire to Louvain, as they did to other Belgian towns, only when dire necessity demanded it"; their intention was to destroy "only those quarters where civilians offered treacherous and murderous resistance," but the flames having spread to the district in which the buildings referred to were situated and it being impossible to save them, the Germans were not to blame.<sup>3</sup>

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cathedral on fire when not a single neighboring house was burning," and he adds that "it has been proven that the fire was deliberately set by the Germans at various places in the cathedral, especially on the tower roof." Finally, he points out that in October, 1914, the Germans admitted having themselves set fire to the cathedral on the alleged ground that machine guns had been placed in the towers.

<sup>1</sup> Lettenhove (*La Guerre et les Œuvres d'Art en Belgique*, p. 73) says: "For my part, I know that many private collections embracing the works of Van Eyck, Rubens, Van Dyck, Verhaegen, Meunier, and others were loaded on wagons and transported by train to Germany." Cf. also the Belgian *Livre Gris*, p. 383.

The treaty of peace required Germany, by way of reparation for the destruction of the library of Louvain, to deliver over to the city manuscripts, early printed books, prints, etc., "to the equivalent of those destroyed."

<sup>2</sup> *London Times*, September 5, 1914. Sir Frederick Pollock in a letter to the *London Times*, (August 30, 1914) declared that "it exceeded in horror and calculated wickedness any military crime committed since the Thirty Years' War." The *Times* in an editorial characterized it as "an atrocious act without a parallel even in the dark ages and one which would turn the hands of every civilized nation against the Germans."

<sup>3</sup> Cf. the *Belgian People's War* (being the title of an English abridgment of a German white book entitled *Die Völkerrechtswidrige Führung des Belgischen Volkskriegs*, 1915), p. 9. Some German apologists charge that the Belgians had placed machine guns on the roof of the library building and had fired on the German troops from that place. See Müller-Meiningen, *Der Weltkrieg und*

The German troops were, we are told, "not guilty of objectionable conduct and did not commit acts which were in violation of international law"; on the contrary, "it was the civilian population of Louvain and vicinity who stand charged with having disregarded the provisions of international law and with having caused through their thoughtless and criminal actions, damage to the German army as well as to the city of Louvain."<sup>1</sup> In fact, the German troops were entitled to special credit for "having saved as far as possible treasures of art not only in Louvain but also in other Belgian towns,"<sup>2</sup> and, we are told, "it is now known that the hôtel de ville was saved only through the heroic struggles of the German soldiers."<sup>3</sup>

§ 284. **The German Defence Analyzed.** Whether the inhabitants were guilty of the acts charged against them or not it is impossible to say. The Belgians themselves emphatically denied the charges.<sup>4</sup> Admitting for the sake of argument that the civil population was guilty of attacking the German troops after they had occupied the city, it by no means follows that a punitive measure so destructive in its results was justified. The burning of certain quarters of a city in which acts of hostility have taken place could be justified in an extreme case, if no other form of retribution were adequate. But even this doubtful procedure should never be resorted to by a military occupant unless he is absolutely certain of being able to control

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*der Zusammenbruch des Völkerrechts* (Eng. trans. by Orchille under the title, *Who are the Huns?* p. 250). But the White Book does not appear to make this charge.

<sup>1</sup> *The Belgian People's War*, p. 89. The burning of Louvain is defended by Professor Zitelmann in the *Preussische Jahrbücher* for October-December, 1914, pp. 472 ff.

<sup>2</sup> *Ibid.*, p. 9.

<sup>3</sup> Müller-Meiningen, *op. cit.*, p. 249. In fact, it has been asserted, the Germans probably took care to save the hôtel de ville because it was the headquarters of the German Kommandantur.

<sup>4</sup> The German charges are analyzed in the minutest detail and denied in a somewhat ponderous Belgian official document entitled *Réponse au Livre Blanc Allemand du 10 Mai 1915*, published by the Belgian ministries of justice and of foreign affairs (Paris, 1917). Nearly two hundred pages of the *Réponse* (219-391) are devoted to the burning of Louvain. The depositions of German witnesses as published in the German White Book are dissected, and the depositions of many citizens of Louvain are included in the documentary evidence. Cf. also a Belgian document entitled *L'Armée Allemande à Louvain en Août 1914 et le Livre Blanc Allemand du 10 Mai 1915* (Paris, 1917), the whole of which (169 pages) is devoted to a discussion of German conduct at Louvain and to refuting the charges set forth in the German White Book.

the spread of the conflagration thus started and prevent the destruction of sacred edifices, historic monuments, libraries, art galleries, and the like, the sanctity of which is established not only by the customary law of nations but by international convention. To apply the torch indiscriminately to a whole city filled, as Louvain was, with rare artistic and historic treasures was an act of vandalism for which there can be no valid defence.<sup>1</sup> No consideration of military necessity can be pleaded as a defence for the destruction of such monuments of civilization, nor can it be justified as a legitimate measure of reprisal, for as Hall very properly remarks, reprisals can be resorted to only under the pressure of absolute necessity and even then not by way of revenge but only for the purpose of deterring an enemy from repeating the offence.<sup>2</sup> Had the Belgian armies committed such acts in Germany, retaliation in kind against their own towns would have been defensible as war law now stands, but as a form of collective punishment for the acts of civilians the destruction of Louvain possessed none of the elements of a legitimate act of reprisal.

§ 285. **The Destruction of the Cathedral of Rheims.** What is also generally regarded as an act of sheer vandalism was the bombardment and virtual destruction by the Germans of the cathedral of Rheims.<sup>3</sup> The hôtel de ville, a historic edifice built during the reign of Louis XIII and containing rare wood

<sup>1</sup> The Germans went about their task of destruction in the most systematic manner, going around from house to house flinging burning petroleum lamps or pastils into windows. There was also a great amount of looting and pillaging of wine cellars, rape, and other acts of violence. Their conduct is fully described by Toynbee in his book *The German Terror in Belgium*, pp. 94 ff., a highly documented study based on official reports and the testimony of eye-witnesses.

<sup>2</sup> *International Law*, 6th ed., p. 411. Cf. also the Instructions for the Government of the United States Armies, arts. 17-28. The American *Rules of Land Warfare* of 1914 (art. 386) remark that reprisals should not exceed the degree of violence committed by the enemy. Villages or houses, they add, may be burned only for acts of hostility from them, where the guilty individuals cannot be identified, tried, or punished. The British *Manual* (art. 414) likewise, while admitting that the custom of war permits as an act of reprisal the destruction of houses by burning or otherwise, limits it to those whose inmates, without possessing the rights of combatants, have fired on the troops, and it adds that the destruction should be confined to the property of the guilty.

<sup>3</sup> The archbishop's residence, with its valuable library, also appears to have been burned; likewise the theatre, the palace of justice, the ethnographic museum, and various hospitals. *Almanach de la Guerre, Reims et la Marne*, ed. 1916 (publié par Jules Matot), p. 425.

carvings, paintings, and other priceless works of art, many of which could not be removed in time, was destroyed by fire. The first bombardment of the cathedral took place in September, 1914. It was subsequently renewed and continued at irregular intervals throughout the succeeding three years. By April, 1918, Rheims was "nothing but a great pile of smoking ruins." As for the cathedral, it was "falling stone by stone and there was little left except the west front and the pillars."<sup>1</sup> Soon after the first bombardment took place, the French minister of foreign affairs addressed a note to the governments of neutral powers in which he said:

"Without being able to plead even military exigencies, and solely for the pleasure of destruction, the German troops have subjected Rheims cathedral to a systematic and furious bombardment. The government of the Republic finds it necessary to denounce to universal indignation this revolting act of vandalism which by handing over to the flames a sanctuary of our history, has robbed humanity of an incomparable portion of its artistic patrimony."<sup>2</sup>

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The pretext alleged by the Germans as a justification for the bombardment of the cathedral was that the towers were being used by the French for purposes of military observation. It was their right, therefore, to destroy the post of observation just as they had done in the case of the cathedral of Strasburg which, they alleged, was used by the French for similar purposes in 1870. In doing this, they inflicted no more damage than was necessary to remove the post of observation.<sup>3</sup> The Germans

<sup>1</sup> G. H. Perris in a despatch to the *New York Times* (April 21, 1918) described the cathedral as a "superb ruin."

<sup>2</sup> Paris despatch, the *New York Times*, April 20, 1918.

<sup>3</sup> The charge against the French for thus using the towers of the cathedral and the German justification are set forth in a white book issued by the German ministry of war entitled, *Die Beschiessung der Kathedrale von Reims* (Druck und Verlag von Georg Reimer, Berlin, 1915). This publication alleges that the French journal *L'Illustration* of September 26, 1914, contained a statement to the effect that an electric searchlight had been installed in one of the towers, and that this was admitted by the master of the cathedral chapel in the same paper of October 10. Cf. also an official *communiqué* of September 23, 1914, issued at Berlin and published (in French) in the *Revue Gén. de Droit Int. Pub.* (1915), Docs., p. 82. The chapel master in a published statement, however, declared that the electric light had been installed in the tower before the beginning of the siege, and that it remained there but a single night, after which it was removed and never restored. Cf. also G. H. Perris, *The Campaign of 1914 in France and Belgium*, p. 354.



subsequently charged that French artillery had been placed in front of and about the cathedral, and that this part of the city was bombarded "in order to scatter these collections." Special instructions, they allege, had been given that so far as possible the cathedral should be spared.<sup>1</sup> In fact, they contended, the bombardment was "carried out in the most careful manner" according to a plan of the town which was in possession of the commander of the battery, and that as soon as the above-mentioned objects had been accomplished, the bombardment ceased.<sup>2</sup> So far as the damage to the interior was concerned, that was caused not by the bombardment but from the spread of the fire from the adjoining houses to the scaffolding that had been erected for making repairs on the building. The French were also reproached for making no effort to extinguish the flames, and the local authorities were accused of omitting "with almost incomprehensible negligence" to take measures to insure the safety of the art treasures, although they had ample opportunity to do so after the evacuation of the town by the German troops.

§ 286. **The German Defence Analyzed.** Against these charges the French authorities entered an emphatic denial. Both General Joffre and M. Landrieux, the ecclesiastical chief of Rheims, stated over their own signatures that not only were the towers of the cathedral never used by the French as posts of observation, but that a Red Cross flag flew from the building in which German wounded had been collected and were being

<sup>1</sup> The general headquarters of the German army issued a statement on September 22, 1914, defending the bombardment of the cathedral as an act of military necessity. The French, the statement went on to say, had by strong fortifications "forced" the Germans to attack the town by all means in their power. Nevertheless, the commander took special care to preserve the cathedral so long as the enemy refrained from using it for military purposes, and after September 20, when the white flag was hoisted upon it, it was respected until an observation post was discovered in one of the towers. Thereupon the Germans shot away the post by means of light artillery, after which they took no further measures beyond what were absolutely necessary. "The responsibility rests with the enemy who sought to make an unlawful use of a venerable piece of architecture under the protection of the white flag." Text of the statement in Müller-Meiningen, *op. cit.*, pp. 247-248.

<sup>2</sup> The German jurist Stier-Somlo in an article in the *Zeitschrift für Völkerrecht*, Bd. VIII (1914), pp. 568-608, defends the bombardment of the cathedral as an "act of self-defence against an insidious attack," and he adds: "History will exonerate the Germans from the false accusation of having wantonly destroyed it without justification."



cared for; and this was the testimony of the population of Rheims.<sup>1</sup>

It is generally admitted by writers on international law that if the military commander of a besieged place uses a church or other building whose immunity is established, as a stronghold, a storehouse, or an observatory, as the French are alleged to have done at Metz, Strasburg, and Toul in 1870 and at Rheims in 1914, the besieger may bombard the place, and he cannot be held responsible for damages caused in consequence of their proximity to other buildings which are liable to bombardment.<sup>2</sup> The French war manual itself admits that the use of such an edifice as an observatory justifies its destruction by the besieging forces.<sup>3</sup> If the German allegation be true, the Germans were undoubtedly within their rights in cutting away the post of observation and in endeavoring to disperse the batteries which are alleged to have been placed about the cathedral; and if their bombardment ceased as soon as these objects had been accomplished, they can hardly be held responsible for the damage which resulted to the cathedral. In view, however, of the veneration in which the French held the cathedral, it is probably safe to assume that they would never have exposed it to destruction by using it for military purposes, especially when the advantages resulting from such use would have been very slight.<sup>4</sup> The

<sup>1</sup> Cf. General Joffre's statement in the *Revue Gén. de Droit Int. Pub.* (1915), Docs., p. 83, and the statement of the vicar-general, M. Landrieux, *ibid.*, p. 90; also the latter's note in *Les Violations des Lois de la Guerre par l'Allemagne* (pp. 192 ff.), a document published by the French ministry of foreign affairs (1915). M. Landrieux states that the French at first intended to install a post of observation on the tower, but subsequently abandoned the idea. Cardinal Luçon, archbishop of Rheims, made the following denial of the charges: "Grievously affected by the renewed firing directed against various churches of my episcopal city, under the pretext that they had been put to military use, I hereby declare that I know from positive sources, and I hereby affirm, that neither the cathedral nor any of the churches of Rheims, nor their towers or belfries, have been made use of for military ends." This statement is published over his signature in *Le Journal of Paris*, issue of April 22, 1917.

<sup>2</sup> Cf. Spaight, p. 185. <sup>3</sup> *Les Lois de la Guerre Continentale*, p. 64.

<sup>4</sup> The French pointed out that the use of the cathedral towers for observation purposes would have been ineffective, since they are only about eighty metres high. Furthermore, it was unnecessary, for in fact French observation balloons could be seen over the city every day signalling to the French troops and communicating the information which the Germans alleged they were endeavoring to communicate from the cathedral towers. Moreover, as was pointed out in an official *communiqué* issued at Paris, the neighboring hills offered better and

neutral world at least has accepted the statement of General Joffre and the venerable archbishop that no such use of the cathedral as the Germans charged was in fact ever made.

In any case, if we admit that the Germans were within their rights in bombarding the cathedral in September, 1914, because a post of observation was at that time installed in one of the towers, what justification was there for continuing the bombardment at irregular intervals throughout the two following years, when according to their own admissions, the cathedral was no longer being used for purposes of military observation? The French charges that the subsequent bombardments were, therefore, wanton, deliberate, and without excuse would seem to be well founded.

Nothing but considerations of the gravest military necessity could have justified the destruction of a monument which not only was regarded as one of the architectural glories of France, but which in a sense belonged to all mankind. For seven centuries it had been an architectural and historic landmark of France; it was within its sacred precincts that Charles VII was crowned by Joan of Arc, and it was regarded by the French with a peculiar reverence. Its west façade was an exquisite example of renaissance architecture; some of its windows were without rivals in Europe, and its choir stalls and wood carving have received the unstinted admiration of all who love and appreciate art.<sup>1</sup> Monuments of this character are not only entitled to respect because of their sanctity but, as stated above, they are especially protected by the law of nations. They are a part of the common heritage of civilization, and what the vice-admiralty court of Halifax said in 1813 in decreeing the restoration to the Philadelphia Academy of science of a collection of paintings captured by a British cruiser, namely, that "the arts

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less dangerous posts of observation. Finally, the French assert that had they decided to use the towers for this purpose, they would have connected them with the military headquarters by means of a telephone so as to avoid attracting the attention of the enemy.

<sup>1</sup> The foundations of the cathedral were laid in 1211, and the structure was entirely completed before the end of the thirteenth century. Its history and architectural splendor are described by M. Ch. Gaudier in Matot's *Almanach de la Guerre, Reims et la Marne*, 1914-1915, pp. 286 ff., and by M. Henri Jodart, *ibid.*, pp. 294 ff. Cf. also *Reims* in a brochure entitled *Les Villes Martyres*, by M. André Michel (Paris, 1915), and Latour, *La Cathédrale de Reims*.

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and sciences are considered not as the peculium of this or that nation, but as the property of mankind at large,"<sup>1</sup> might be said equally of such architectural and historic landmarks as the cathedral of Rheims.

§ 287. **Destruction of Other Edifices and Historic Monuments in Belgium and France.** Another less famous monument bombarded by the Germans was the cathedral of Saint Rombaud at Malines. This historic edifice, together with the church of Saint Pierre, the hôtel de ville, a museum, and the Catholic university, were all made the objects of German artillery fire and were badly injured, although the town was without strategical value and at the time was entirely unoccupied by Belgian troops.<sup>2</sup> The cathedral was begun in the thirteenth century and completed in the year 1312. It was especially famous for its Gothic façades, its massive tower, and its chimes, which are said to have been the finest in Belgium. It was filled with many rare works of art, both of painting and sculpture. The Belgians claim that the bombardment of these sacred and historic structures was a pure act of vandalism without any military justification whatever. The town had been abandoned by the soldiers, and it was both open and undefended. In a statement issued by the German war office on December 31, 1914, the German authorities asserted that their troops had been subjected to "a long and violent bombardment" at the hands of the Belgian forces, who were in occupation of a place to the north and west of the town and who themselves threw shells upon the cathedral. It was also charged that the tower of the cathedral was being used by the Belgians as a military observation post, and that it was only for the purpose of removing the post that it was fired upon by the Germans.<sup>3</sup>

<sup>1</sup> Westlake, *Int. Law*, Vol. II, p. 161; Moore, *Digest*, Vol. VII, p. 460.

<sup>2</sup> Massart, *Belgium under the German Eagle*, p. 127; Davignon, *Belgium and Germany*, p. 51; and Lettenhove, *La Guerre et les Œuvres d'Art en Belgique*, p. 100. The architecture and artistic character of the cathedral are described by Lettenhove, *ibid.*, ch. V, and by George Wharton Edwards in his *Vanished Towers and Chimes of Flanders* (1918), pp. 19 ff. Cf. also Destrée, *Villes Mourtrées de Belgique*.

<sup>3</sup> French translation in Langenhove, *The Growth of a Legend*, p. 29. Massart (p. 128), however, denies the charge and asserts that the shells fired by the Belgian troops fell on the outskirts of the town where the Germans were posted. Cardinal Mercier denounced the bombardment as an act of barbarism and one without military justification. Cf. his protest in Saint Yves, *Les Responsabilités de l'Allemagne*, p. 363. The Belgian commission of inquiry states that about every four

The cathedral at Soissons, famous for its Gothic spires and regarded as one of the historic and artistic monuments of the region, was also shelled by the Germans and badly injured, and so was that of Senlis. An historic church at Termonde, together with the communal library and archives, was likewise shelled and practically destroyed.<sup>1</sup> The pictures, however, with three exceptions were saved. The church of Notre-Dame at Antwerp was also bombarded, the defence of the Germans being that it, too, was used as a post of military observation. Belgian writers admit that at one time the tower was being so used, but that took place before the siege of the city had begun.<sup>2</sup> When the allied troops entered Bruges in October, 1918, they found that the famous belfry had been used as a garage and workshop by the Germans, and that the interior walls of the historic structure had been broken down and chimneys erected to meet the needs of the workmen.<sup>3</sup> The cathedral at Arras, an eighteenth-century structure, was bombarded and ruined, as were also the adjacent seminary and episcopal buildings of Saint-Vaast.<sup>4</sup> But what was an even greater loss was the complete destruction of the historic hôtel de ville, constructed in the fifteenth century and regarded as one of the architectural jewels of northern France.<sup>5</sup> The hôtel de ville of Lille, an imposing

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minutes a German battery fired a shell in the direction of the cathedral, and that the houses damaged by bombardment were all without exception in the vicinity of the cathedral. *The Case of Belgium*, p. 24.

<sup>1</sup> Reports on the *Violation of the Rights of Nations and of the Laws and Customs of War*, p. 17. Cf. also Lettenhove, p. 115.

<sup>2</sup> Massart, p. 124. M. Landais, curé of the cathedral, states that forty shells were fired upon the cathedral on January 9, 1915. He denies the charge that it was used for military purposes. "I declare," he said, "that neither cannons, machine guns, nor armed soldiers found cover in the cathedral and that never was it used as a post of observation." Text of his letter in Michel, *Les Villes Martyres*, pp. 35-36.

<sup>3</sup> *New York Times*, October 25, 1918.

<sup>4</sup> The *New York Times* of June 23, 1918, printed the text of a letter of November 24, 1917, addressed by the bishop of Tournai to the Pope, in which he charged that about one-third of the 543 churches of his diocese were entered by German soldiers who stopped the services, expelled the congregation, lifted the consecrated stones of the altars, carried away sacred vessels and objects of art, and even entered convents and assaulted the nuns.

<sup>5</sup> Owen Johnson, an American newspaper correspondent, who saw the ruins of the hôtel de ville, says, "The destruction of this priceless monument was deliberately intended." While neighboring houses, he declares, were struck with stray bits of shell, the hôtel de ville was reduced to a heap of ruins. See his book *The Spirit of France*, p. 106.

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example of renaissance architecture (though erected in the nineteenth century), was burned by the Germans with the greater part of its library of one hundred thousand volumes and many valuable manuscripts. The cathedral at Amiens was also bombarded by the Germans and badly damaged, and the windows of the cathedral at Beauvais were shattered. When the British forces entered Douai in October, 1918, they found the stained glass windows in the church of St. Peter smashed and the great organ broken up, while the religious ornaments were scattered about the floor. The city hall, which the German command had used as its headquarters, was pillaged and sacked, and most of the paintings in the museum had been carried away.

An "incomparable historic monument," destroyed by the Germans in October, 1914, was the ancient Cloth Hall (*Les Halles*) at Ypres, the foundations of which, covering some forty-eight hundred square metres were laid in the year 1200 by the Count of Flanders and which was completed in 1304. During the middle ages it was the headquarters of the cloth makers, weavers, and fullers, and for centuries it had been the pride and glory of the town. It was regarded as one of the most exquisite examples of Gothic architecture in Europe.<sup>1</sup>

As usual, the Germans appear to have justified the bombardment of the Cloth Hall on the ground that the tower was being used by the Belgians for purposes of observation; but if this was their excuse, what reason could there have been for bombarding and destroying the hall proper and the other historic buildings in the vicinity, such as the church of Saint Martin (dating from the thirteenth century), the museum, the library, and the hôtel de ville (erected in the sixteenth century) containing a large collection of paintings by Belgian and French artists? There were no English, French, or Belgian troops in the town; it was entirely undefended, and no resistance was offered by the

<sup>1</sup> Cf. the description in Davignon, *Belgium and Germany*, p. 51. Cf. also Michel, *Les Villes Martyres*, p. 44; Verhaeren, *Belgium's Agony*, p. 79; Williams, *With Our Armies in Flanders*, p. 105; Saint Yves, *op. cit.*, 365. Lettenhove (*op. cit.*, p. 129) describes it as the "most beautiful civil monument of the middle ages, as the cathedral at Rheims was the most beautiful religious monument." Michelet said of it that neither Notre-Dame of Paris, nor any other monument of the middle ages was comparable to it. The architectural beauty of the Cloth Hall is fully described by George Wharton Edwards in his *Vanished Towers and Chimes of Flanders*, pp. 72 ff., and by Lettenhove, *op. cit.*, pp. 132 ff.

inhabitants. The Belgians assert that the destruction was, therefore, wanton and wholly without military excuse.<sup>1</sup>

A unique historical monument and one of the most striking architectural landmarks of the feudal period, destroyed by the Germans in the spring of 1917 when they evacuated the Somme region, was the Château de Coucy, built in the thirteenth century.<sup>2</sup> During the reign of Louis XIV Cardinal Mazarin had attempted to destroy it, because it was used as a rallying point for the feudists. What he failed to do, however, in the seventeenth century, the Germans were able to do in the twentieth, and it appears to have been done wantonly and without the slightest military justification. Whitney Warren, an American architect who was commissioned by the French government in 1917 to examine the castle and make a report concerning its condition, thus described what he found: "All the devastation I have seen to date is child's play compared to that. The most fiendish ingenuity has been employed to efface it absolutely, and all for no military advantage. There is nothing left on which to make an architectural report."<sup>3</sup> Upon their evacuation of Péronne in the spring of 1917 the Germans dynamited every building that had been left standing, including the cathedral and the city hall.<sup>4</sup>

§ 288. **Still Other Examples of Vandalism.** In scores of other Belgian and French towns similar acts of vandalism were committed. At St.-Quentin the cathedral was burned;<sup>5</sup> at Visé the beautiful hôtel de ville, constructed in the seventeenth century, and a historic church were destroyed;<sup>6</sup> at Namur the hôtel de ville with its archives and paintings was "deliberately destroyed";<sup>7</sup> among the twelve thousand buildings burned

<sup>1</sup> Cf. Lettenhove, p. 131, and Edwards, p. 73.

<sup>2</sup> The castle was an architectural gem of mediæval France, and enormous sums had been spent in preserving it. It was filled with art treasures, stained glass windows, rare tapestries, and carved oak furniture.

<sup>3</sup> Article in *New York Times* cited above. Cf. also text of the French official announcement in the *Times* of March 21, 1917.

<sup>4</sup> Chas. H. Grasty (an eye-witness) in the *New York Times*, August 5, 1917.

<sup>5</sup> The Germans charged that the cathedral was set on fire by shells fired by French artillery, but this charge was emphatically denied by the French, who asserted that the act was wantonly and deliberately committed by the Germans. *New York Times*, August 20, 1918.

<sup>6</sup> Lettenhove, p. 46.

<sup>7</sup> *Ibid.*, p. 56.



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at Dinant were three churches, one of which dated from the thirteenth century;<sup>1</sup> at Lierre a Gothic church was burned, and so was the hôtel de ville, erected in the seventeenth century;<sup>2</sup> at Termonde the hôtel de ville met the same fate;<sup>3</sup> at Nieupoort a "marvellous" Gothic church, which dated from the early fourteenth century, one of the largest in Flanders, was destroyed with its rich art treasures;<sup>4</sup> at Dixmude the ancient church of St. Martin, one of the most beautiful of Flanders, to say nothing of the city hall and various other buildings which may be classified as historic monuments, was destroyed.<sup>5</sup>

The above are some of the more famous historic monuments, sacred edifices, and institutions of one kind or other which were destroyed, irreparably injured, or damaged by the German armies. There was hardly a town in the occupied districts of Belgium and France which did not suffer a loss of this character.<sup>6</sup> The French minister of the interior, M. Malvy, in a report made in 1917 concerning the destruction of buildings by the Germans in France, summarized the results as follows: "Public buildings were wrecked in 428 communes; the damaged edifices included 221 city halls, 379 schools, 331 churches, and 306 other structures of a public or semi-public character. Public monuments damaged, 60."<sup>7</sup> Fifty-six of the edifices destroyed were classed as "historical." General von Bülow, while occupying the ancestral château of the Prince of Monaco in the neighborhood of the village of Sissonne near Rheims, imposed a fine of 500,000 francs on the village, and in consequence of the inability of the inhabitants to raise so exorbitant a sum the general threatened to destroy the château and the village. The prince protested in a letter of October 22, 1914, to the German Emperor and on the same day addressed a letter to General von Bülow in which he said:

<sup>1</sup> *Ibid.*, p. 57.      <sup>2</sup> *Ibid.*, p. 111.      <sup>3</sup> *Ibid.*, p. 114.      <sup>4</sup> *Ibid.*, p. 153.

<sup>5</sup> Cf. Edwards, *Vanished Towers and Chimes of Flanders* (1918); also Marguillier, *La Destruction des Monuments sur le Front Occidental* (Paris, 1919).

<sup>6</sup> M. Massart, vice-president of the Academy of Sciences of Belgium, prints a map of the environs of Malines showing twenty-seven villages in which churches were destroyed by the Germans. Most of them dated from a period anterior to the year 1500. Massart states that in the province of Brabant north of Vilverde hardly a church belfry was left intact, and that in many towns every church was burned or profaned. *Belgians under the German Eagle*, p. 73.

<sup>7</sup> The Count de Gaix de Saint-Aymour, in his book *Autour de Noyon*, gives the details of the destruction of many historic castles and churches in the region of which Noyon is the centre.



"My conscience and my dignity place me above fear, as also my personal will shall elevate me above regret; but should you destroy the Château de Marchais, which is one of the centres of universal science and charity, should you reserve to this archaeological and historical gem the treatment you have given to the cathedral of Rheims — when no reprehensible action has been committed there — the world will judge between you and myself."<sup>1</sup>

Before evacuating the Somme region in 1917 all the churches are said to have been stripped of everything they contained in the form of copper and brass, which was sent to Germany for the manufacture of war materials. Even church bells and chimes were requisitioned and taken away.<sup>2</sup> The same procedure was followed in Belgium. During the retreat of the Germans from northern France in the autumn of 1918 many acts of vandalism were committed, both churches and historic châteaux being pillaged and defiled in mere wantonness and the spirit of revenge when no military interest was subserved.<sup>3</sup>

§ 289. **Destruction of Historic Monuments and Works of Art in Italy.** Italy, itself a veritable storehouse of rare and priceless works of art, like Belgium and France was subjected to a heavy toll at the hands of Austrian aviators. During the early months following the entrance of Italy into the war the Scalzi church of Venice, with its exquisite ceiling decorated by Tiepolo, was completely destroyed by Austrian aviators. The dome of St. Peter at Castello was ruined, and the vaulting of the church of St. John and St. Paul, containing monumental tombs of the Doges, was damaged.<sup>4</sup> In August, 1916, the historic church of Santa Maria Formosa at Venice, one of the most ancient of the city (built at the beginning of the twelfth century) and one of the most frequently admired by tourists, was destroyed by a bomb dropped either by an Austrian or a German

<sup>1</sup> Texts of the letters in a pamphlet entitled *German War Practices* published by the United States Committee on Public Information, pp. 45-48.

<sup>2</sup> Associated Press despatch from Noyon, *New York Times*, June 30, 1917. To "regularize" such seizures the Germans are said to have issued a general requisition for all bells made since the middle ages. Those cast between 1400 and 1800 were spared only when they bore historical inscriptions or otherwise had an exceptional historical or artistic value.

<sup>3</sup> The despatches to the *New York Times* contain many accounts of such instances. Cf. also the book of the Abbé Calippe, *La Somme sous l'Occupation Allemande*, especially chs. IV and V.

<sup>4</sup> Cf. an article by James H. Hyde entitled *Avanti Savoia: Impressions du Front Italien*, in *Parlement et l'Opinion*, January, 1917.

aviator. Most of the art treasures of the church had been removed to the interior of the country a year before, but the exquisite mosaics of the dome, made by Palma Vecchio, were destroyed.<sup>1</sup> In August, 1917, during the course of the thirty-sixth air raid on Venice, an Austrian aviator dropped bombs upon an ancient hospital famous for its ceiling decorated by fifteenth-century artists. The ceiling was badly damaged, and fourteen of the patients were killed. During the same raid a bomb was dropped on the historic church of Santo Giovanni near St. Mark's, damaging the dome and a famous painting.<sup>2</sup> In December, 1917, the façade of the cathedral at Padua was destroyed, and the basilica of the Santo and the municipal museum were damaged by bombs dropped by Austrian aviators.<sup>3</sup> In February, 1918, what was described in the press despatches as a deliberate raid upon the "monuments, palaces and very stones" of Venice was made by a large squadron of Austrian aviators, the Doge's Palace being one of the chief targets. The oratory in the church of Santa Giustina was destroyed, and two marble columns in the church of San Simeone Piccolo were shattered. Among the sixty buildings damaged was the church of St. John Chrysostom, built in the fifteenth century.<sup>4</sup> Other churches damaged or destroyed by Austrian aviators were those of St. Cyriaque at Ancona, St. Mary des Carmes at Venice, St. Apollinaris at Ravenna, and St. Francis at Venice, all "historic monuments" and rich in art treasures.<sup>5</sup> In Italy as in Belgium and France the invaders were charged with committing spoliations upon both public and private art collections and with carrying off to Vienna, Budapest, and Berlin numerous masterpieces as well as the contents of churches and museums.<sup>6</sup>

<sup>1</sup> *New York Times*, August 13, 1916.

<sup>2</sup> Cf. the testimony of A. R. Decker, who saw the ruins. *Chicago Daily News*, November 2, 1917. The hospital formed a part of the famous school of St. Mark's and was considered one of the artistic wonders of Italy. Cf. also the *New York Times* of August 20, 1917.

<sup>3</sup> *New York Times*, January 1, 1918. The ancient monumental Caramin church, containing frescoes by Titian and Campagnola, was set on fire and partially destroyed by incendiary bombs dropped by enemy airmen.

<sup>4</sup> Despatch from Venice by Percival Gibbon, *New York Times*, March 3, 1918.

<sup>5</sup> 45 *Clunet*, 625.

<sup>6</sup> Cf. an Associated Press despatch of December 28, 1918, containing a summary of "semi-official" despatches from Rome charging that the enemy had

§ 290. **Observations on the Law and German Practice.** In considering the obligation which international law imposes upon a belligerent to spare such edifices and institutions, it is well to distinguish between his right of destruction during the course of a bombardment, the purpose of which is to compel a defended town to surrender, and his right of destruction as a military occupant after he has gained possession of it. International law allows a belligerent to bombard a defended town or city, and the presence of cathedrals, historic monuments, and institutions devoted to education, art, philanthropy, and the like do not deprive him of this means of attack. The Hague convention merely imposes on him the duty to spare such objects as far as possible, to spare those which are marked by distinctive and visible signs and those which are not used at the same time for military purposes. The prohibition in respect to destruction is not, therefore, absolute, and it by no means follows that a belligerent who destroys such buildings during the course of a bombardment is guilty of a violation of the law of nations. The phrase "as far as possible" is a very elastic one and may be broadly interpreted by an attacking commander to whom the law of military necessity is paramount. Buildings of this character are frequently situated in the centre of defended or fortified cities which cannot be bombarded without their being exposed to injury or destruction, and if the attacking commander cannot see their markings, or if while endeavoring to bombard those portions of the city which he has a lawful right to destroy, he finds it impossible to avoid shelling the protected buildings, he cannot justly be reproached for having violated the Hague convention. Furthermore, it is always open to the defending commander in such cases to surrender, provided notice of the intended bombardment has been given, and thus save from destruction the buildings which international law seeks to protect. It may fairly be assumed that in some of the instances in which charges were made against the Germans

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transported to Vienna, Budapest, and Berlin "whatever could be removed from private and public buildings and churches," and that "all the sumptuous villas of the Venetian noblemen had been pillaged and their wonderful artistic collections transported to Austria." The villa Soderini, near Nervesa, containing a fresco by Tiepolo, was destroyed, and the temple erected by Canova and Posagno was badly damaged.

and Austrians their conduct was not contrary to the letter of the Hague convention. The Italians admit, for example, that the destruction of the frescoes of Tiepolo at Nervesa and Col-lato during the course of a bombardment was not indefensible; on the other hand, the destruction of artistic monuments in the undefended cities of Venice, Treviso, Padua, Ravenna, etc., was inexcusable. In some cases, as stated above, the Germans and Austrians defended the action on their ground that the buildings which suffered were being used by the enemy for observation or other military purposes which deprived them of the immunity conferred by the Hague convention.<sup>1</sup> It is impossible to verify the truth or falsity of these charges so frequently made against the Belgians and the French. We can only say that in every instance where such a charge was made it was emphatically denied.<sup>2</sup> In some instances they pointed out that other equally effective posts of observation were available to their commanders, and that, in any case, it was not to be assumed that a people who love art as the Belgians and French do and who regard their ancient churches, cathedrals and historic monuments with a peculiar veneration would have been willing to expose them to destruction for the sake of so slight a military advantage.

But whatever may be the justification for the destruction by bombardment of such objects by an attacking army who is

<sup>1</sup> Some instances are mentioned in the white book, *The Belgian People's War*. Cf., e.g., the charge on p. 36 that the tower of the church at Termonde was mounted with a machine gun. This charge was usually made in the official German *communiqués* issued in reply to the Belgian, English, and French protests against the destruction of such buildings. Professor Dr. Clemen, who was appointed by the German government to supervise the collection and preservation of art treasures in the occupied regions of Belgium and France, made a report in May, 1917, in which he defended the conduct of the German armies in respect to the treatment of art collections, historic monuments, and the like. "In every case," he said, "it was the greatest military necessity that led the Germans to make the bombardments complained of; church towers were made use of for military purposes and they had to be shot away as an act of necessity." "The provisions of the Hague convention of 1907," he added, "were based upon quite primitive conditions and today can no longer be carried out!" Text in *New York Times*, May 27, 1917.

<sup>2</sup> This oft-repeated charge is, according to the Belgian writer Langenhove, one of the "legends" of the war. Cf. his book *The Growth of a Legend*, especially p. 69.

The Belgians charge that the Germans themselves sometimes used church belfries and other similar objects as posts of military observation. Cf. Somville, *The Road to Liège*, p. 109. Archbishop Laudrieux charges that they so used the cathedral tower at Rheims while in occupation of the city.

endeavoring to compel a defended town to surrender, there can be no excuse at all for the destruction by a military occupant who is already in possession of the place and against whom no organized resistance is being made by the inhabitants. The obligation which international law imposes upon military occupants to spare such objects is absolute, and it does not recognize any exceptions or conditions of military necessity, as it does in the case of bombardments by an invader. Nor is destruction of such objects by way of reprisal or as a collective penalty for acts of hostility committed by individuals ever justifiable. Still less may they be destroyed by a retreating belligerent, for in such a case no consideration of military necessity requires it. In fact, however, many such buildings and monuments destroyed by the Germans during the late war were destroyed not by bombardment for the purpose of reducing the towns in which they were situated, but were burnt after the armed forces were fully in possession, sometimes as a punitive measure for alleged hostile acts of the civil population or as a measure of devastation before retreating, as was the case of the desolation of the Somme region prior to the retreat of the Germans in the spring of 1917 and again in 1918 before their further retreat from northern France. Such acts were inexcusable; they subserved no legitimate military purpose, and in some instances they appear to have been wanton and done in the spirit of revenge. Naturally the Germans denied many of the charges made against them, but the evidence is sufficiently abundant to convict them of guilt in many instances. They also denied the charge of despoiling art galleries and transporting their contents to Germany and claimed special credit for the efforts which they made to collect and preserve from destruction works of art in the war zone. Commissions, they claim, were appointed by the government to collect and preserve such treasures; they were catalogued, removed to places of safety, and put into the custody of the local burgomaster or curator. They asserted, for example, that the only masterpieces saved from the church of St. Peter and the hôtel de ville at Louvain were those rescued by themselves;<sup>1</sup> that in this way they saved the art treasures of St.-Quentin, Péronne, Namur, Dinant, and other places.

<sup>1</sup> For a belligerent to set fire to an art gallery and then claim credit for saving its masterpieces from destruction is one of many examples of logic by which the Germans justified their violations of international law.

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It may be said in conclusion that never before in modern times were so many historic monuments, architectural landmarks, and institutions specially protected by the law of nations destroyed, irreparably injured, or profaned during the course of a war. Belgium and France were by no means the only sufferers; civilization itself has been robbed of many of its artistic treasures and history deprived of some of its most striking landmarks. That these acts should have been done by the armies of a nation which had long boasted of the superiority of the culture and its high appreciation of art only aggravates the offence. The manifesto of the ninety-three German intellectuals issued to the world in 1914 affirmed that "the Germans yield to none in their love of art." The Emperor himself, during a visit to Brussels in 1910 on the occasion of an exposition of seventeenth-century Belgian art, made an address to the citizens, in the course of which he said:

"What I see here gives me extreme pleasure; you have a right to glorify your great masters . . . what nobler task can a nation have than to thus diffuse its strength? Continue in this way, multiply these great artistic enterprises which are the honor of Belgium and toward which one cannot encourage you enough to direct all your efforts. Because it is the rôle, the true rôle of Belgium — yes, your peaceable and neutral country has a mission all pointed out: to be the pacific arena of all our artistic pursuits and meetings."<sup>1</sup>

Unfortunately the conduct of the soldiers of the Emperor when they found themselves in Belgium in 1914 without right, appears to have been animated by no such high regard for the artistic treasures which the Emperor had declared to be the glory and honor of the country.<sup>2</sup>

<sup>1</sup> Quoted by Lettenhove in *La Guerre et les Œuvres d'Art en Belgique*, p. 33.

<sup>2</sup> In March, 1919, the French Academy of Fine Arts addressed a petition to the government suggesting that a certain number of French masterpieces then in the possession of the royal families and public museums of Germany and Austria be seized as a partial indemnity for the destruction and spoliation of French cathedrals, museums, and libraries. It was also suggested that similar seizures should be made by the Belgian State. In April, 1919, it was reported that Italian armistice officials in Vienna were in fact doing this. Against these acts the Vienna authorities protested on the ground that there was nothing in the armistice terms which authorized such a procedure; that some of the works of art being seized were the private property of the former Emperor and therefore were exempt from seizure, and that the pictures had been taken from Venice to Vienna when the former city was an Italian city. *New York Times*, April 13, 1919.

All military codes <sup>1</sup> and all writers on international law condemn the destruction of such objects, except where it is absolutely required by considerations of the gravest necessity. As Kent well says: "If a conqueror makes war upon monuments of art and models of taste, he violates the modern usages of war, and is sure to meet with indignation and resentment and to be held up to the general scorn and detestation of the world." <sup>2</sup> No one has more severely condemned such acts than Bluntschli. "The intentional destruction or degradation," he says, "of monuments and works of art, instruments and scientific collections, by the troops of occupation of enemy territory is not permitted in time of war and is considered today as an act of barbarism." <sup>3</sup>

<sup>1</sup> Cf. the American *Rules of Land Warfare*, 1914, art. 225; the British *Manual*, art. 133; the French *Manuel*, art. 65, and the *Kriegsbrauch im Landkriege* (Carpentier's translation, pp. 46 and 130). The *Kriegsbrauch* declares that all objects which serve the purpose of religious worship, education, the sciences, arts, charity, and nursing must be spared and protected.

<sup>2</sup> *Commentaries on American Law*, Vol. I, p. 93.

<sup>3</sup> *Droit International Codifié* (tr. by Lardy), § 644.



## CHAPTER XIX

### AERIAL WARFARE

§ 291. Employment of Air Craft in Former Wars; § 292. Aerial Operations during the Recent War; § 293. Air Raids over England; § 294. Aerial Bombardments of Italian Towns; § 295. Aerial Operations by Entente Aviators; § 296. Summary of Results; § 297. The Hague Rules regarding Aerial Bombardment; § 298. Recent Discussion of the Question; § 299. When is a Place "Defended" against Aerial Bombardment? § 300. Is it the Duty of an Aviator to Give Warning of an Intended Bombardment? § 301. Violations of Neutrality by Belligerent Air Craft; § 302. Violations of Dutch Neutrality; § 303. Other Instances Charged; § 304. The Law Governing Aerial Navigation over Neutral Territory; § 305. Theories of the Jurists; § 306. Views of the Institute of International Law; § 307. Other Questions Affecting Neutrals; § 308. Legality of the Aeroplane as an Instrument of Combat; § 309. The German Justification; § 310. German Practice Criticised; § 311. Aerial Bombardments as Acts of Reprisal; § 312. Treatment of Captured Aviators.

§ 291. **Employment of Air Craft in Former Wars.** Among the new agencies of combat employed on an extensive scale during the recent war was the airship, the use of which raised a number of important questions of international law affecting the rights of both neutrals and belligerents. As is well known, balloons have been employed for more than a century for purposes of observation, signalling, transmission of despatches, making reconnoissances, and as a means of escape from besieged places.<sup>1</sup> They are said to have been used by the French at Maubeuge and Fleurus in 1794 for observing the movements of the Austrian army. In 1812 the Russians are said to have directed an aerostat charged with explosives against the French lines; in 1815 balloons were used by the French at Antwerp; in 1830, by the French in Algeria, and in 1849 the Austrians

<sup>1</sup> Cf. Bonfils, *Droit International*, p. 858. During the siege of Paris, in 1870, 154 persons, including Gambetta, escaped from the city by passing over the German lines in balloons. Nine thousand kilos of despatches were also transported from the city. Sixty-four balloons are said to have been used for the purpose. Cf. also Phillet, *La Guerre Aérienne*, pp. 16-17. For other accounts of the use of balloons in earlier wars cf. Smith and Sibley, *International Law as Interpreted in the Russo-Japanese War*; Nys, *Droit et Aérostats* in the *Revue de Droit International et de Lég. Comp.*, Vol. IV (1902), p. 501; Rolland, *Les Pratiques de la Guerre Aérienne dans le Conflit de 1914*, *Revue Gén. de Droit Int. Pub.*, 1916, and Banet-Rivet, *L'Aéronautique*, ch. II.

while besieging Venice attempted to direct two hundred small balloons charged with explosives against that city but without success. Balloons were also employed, though with little success, by the Italians in 1859, by the Americans during the Civil war, by the French in 1870, by the British during the Boer war of 1899-1902, and by the Japanese at the battle of Liao-yang in 1904, during the Russo-Japanese war.

Aeroplanes as distinguished from balloons were used for the first time during the recent Turco-Italian and Balkan wars for the purposes of observation and signalling, transportation of despatches, the distribution of proclamations, and the location of mines.<sup>1</sup> During the recent war they were used extensively for the first time for the purpose of dropping bombs on towns and military works and for purposes of combat in the air.<sup>2</sup>

§ 292. **Aerial Operations during the Recent War.** Before considering the questions of international law raised by the use of the air ship during the recent war, it may be well to review briefly the operations as actually conducted and the character of the results attained through the employment of this instrumentality of warfare. The first "aerial raid" to attract attention occurred on August 25, 1914, when a German Zeppelin appeared over the city of Antwerp and dropped several bombs, one of which fell near St. Elizabeth's hospital, partly destroying it. A number of private houses were also destroyed and eight persons killed, most of them while in their beds.<sup>3</sup> Early in September several aeroplanes appeared over Paris and dropped bombs at various places throughout the city, though the damage done was unimportant. On September 5 a "marauding Taube" flew over Ghent and dropped two bombs upon the city, one of which partly destroyed a house, but there was no loss of life.<sup>4</sup>

<sup>1</sup> Coquet, *La Guerre Turque Italo*, *Rev. Gén. de Droit. Int. Pub.*, Vol. XX (1913), pp. 533 ff.; Mirabelli, *Rev. de Droit Int. et de Lég. Comp.*, Vol. XV (1913), pp. 565 ff., and Rolland, article cited, p. 498.

<sup>2</sup> Concerning the various uses to which air craft were put during the recent war, cf. Grahame-White and Harper, *Air-craft in the Great War*, especially Part IV.

<sup>3</sup> Sarolea in his *How Belgium Saved Europe* (p. 183) states that sixty houses were destroyed and ninety others damaged. Cf. also the *Case of Belgium*, pp. 21-22.

<sup>4</sup> A detailed account by an eye-witness of this "raid" upon Antwerp may be found in Powell's *Fighting in Flanders*, ch. III. Cf. also Gibson, *Journal of a Legation in Belgium*, pp. 140 ff. In December, 1915, the king and queen of Belgium narrowly escaped death from a bomb launched by a German aviator, while they were leaving a church in a Belgian village inhabited only by fishermen.

On September 27 several bombs were again dropped on Paris from a German aeroplane, one of which was apparently directed against the Eiffel Tower, which was provided with wireless telegraph apparatus. The bomb exploded with great violence and smashed near-by windows, but did no further damage, except to kill an old man and injure his child. Again on October 12 a score or more of bombs were dropped in different parts of the city of Paris, killing three persons and injuring fourteen others. One of the bombs fell on the cathedral of Notre-Dame, but failed to explode; others were said to have been directed against the Gares du Nord and St. Lazare. In March, 1915, another raid was made by German aviators on Paris and its environs, but no damage was done further than to destroy a number of private houses and to wound a few non-combatants. During the same month nine persons were killed by a zeppelin attack upon Calais. Most of the victims were railway employees and refugees from Lille who were housed temporarily in the cars. In January, 1916, another bombardment of Paris took place which resulted in the killing of twenty-three non-combatant persons, the wounding of some thirty others, and the destruction of a considerable number of private houses. Most of the victims were women and children, an entire family of seven persons in one instance having been killed. On the night of January 31, 1918, an aerial raid upon Paris resulted in the death or wounding of 255 persons, of whom 64 were women and 12 were children.<sup>1</sup> On August 6, 1918, 228 bombs are said to have been dropped on Paris, killing 2 persons and injuring 392 others.<sup>2</sup>

§ 293 **Air Raids over England.** Beginning in January, 1915, a series of air raids over England followed and were continued at irregular intervals throughout the ensuing three years. The result of the first of these attacks, that upon Yarmouth,

<sup>1</sup> *Le Temps*, February 4, 1918.

<sup>2</sup> *New York Times*, December 19, 1918. The total number of persons killed in Paris by bombs dropped either from air craft or fired by long-range cannon during the war was placed at 196. The number of wounded totalled 613. Regarding aerial bombardments in Belgium and France, cf. the *Case of Belgium*, pp. xi ff., 21 ff.; Massart, *Belgians under the German Eagle*, pp. 124 ff.; Saint Yves, *Les Responsabilités de l'Allemagne dans la Guerre de 1914*, pp. 352 ff., and Maccas, *German Barbarism, a Neutral Indictment*, ch. VIII. Cf. also Clunet, *De l'Emploi Abusif des Aérostats de Guerre par les Allemands*, in *Clunet's Jour. de Droit Int.*, 43: 385 ff.; also *ibid.*, 42: 567, 814, 870, and 44: 1379 ff.

was the damaging of some private houses and the killing of several persons, most of whom were old men, women, and children. In June an aerial raid on the northeast coast resulted in the death of 24 persons and the wounding of 40 others, most of whom were women and children. On October 13, 1915, a zeppelin attack was made on London and some of the eastern counties resulting in the death of 56 persons and the wounding of 114 others, a number of whom died from the shock resulting from the suddenness of the attack. Some warehouses were destroyed, and the docks and city pumping station were damaged. On the night of January 31, 1916, a similar raid upon the eastern coast resulted in the death of 67 persons and the wounding of 117 others. Among the victims were 68 women and 8 children. Among the buildings destroyed or damaged were a parish house, a church, and several factories.<sup>1</sup> In March of the same year a raid over Kent resulted in the death of 12 persons and the injuring of 35 others, most of the victims, as usual, being women and children. Among the houses damaged was an orphanage occupied by 80 girls. Not a single military or naval establishment was struck. At Ramsgate the fragment of a bomb fell among a group of children attending a Sunday-school. Three of the little ones were killed and 8 wounded. Among the buildings struck was a hospital.<sup>2</sup>

The London *Times* of June 2, 1916, summed up the results of 44 air raids over England as follows: killed, 409; injured, 1005. Of the killed 114 were women and 73 were children.<sup>3</sup> Other zeppelin raids over England occurred subsequent to the publication of this summary, the most important of which took place during the first week of September, 1916.<sup>4</sup> On September 23, another raid occurred which resulted in the death of 30 persons and the injuring of 110 others.<sup>5</sup> At North Midland

<sup>1</sup> An audience of some two hundred persons, mainly women and children, was being addressed by a woman missionary in the church. She and a number of other persons were instantly killed by the bomb; others were trampled to death while attempting to escape. In some instances entire limbs were torn off and the bodies terribly mutilated. In one town in Leicestershire an entire family was killed by a single bomb. *London Times*, March 10, 1916.

<sup>2</sup> *London weekly Times*, March 20, 1916.

<sup>3</sup> In a summary given by Major Baird of the Aerial Board in the House of Commons on August 22, 1916, it was stated that of all the victims only fifty were military persons.

<sup>4</sup> *London weekly Times*, September 8, 1916.

<sup>5</sup> *New York Times*, September 25, 1916.

Town a chapel was struck and completely wrecked, and some 40 small houses were damaged. The bombs were dropped in a congested working-class district, and the toll taken of women and children was considerable.<sup>1</sup> In May, 1917, an attack on London took place, resulting in the killing of 76 persons and the wounding of 174 others.<sup>2</sup> In the following month 97 persons were killed and 437 wounded during the course of a "raid" on London;<sup>3</sup> on July 7, 37 persons were killed and 141 injured in consequence of another attack upon London; on August 23, a number of persons (including 9 women and 6 children) were killed and 50 injured during a "raid" over Essex;<sup>4</sup> on October 1, London was again bombarded; during the course of the bombardment 9 persons were killed and 42 wounded.<sup>5</sup> As time passed, aerial attacks upon England became less frequent, and by the end of the year 1917 they virtually ceased, the Germans apparently having at last become convinced that they were largely without any military effect.<sup>6</sup>

§ 294. **Aerial Bombardments of Italian Towns.** The Italian government charged Austrian aviators with dropping bombs on churches and historic monuments in Venice in October, 1915. The Austro-Hungarian authorities appear to have defended the act as a legitimate measure of reprisal against Italy for the bombardment of Trieste by Italian aviators. The Italian government, however, claimed that its aviators in fact had bombarded only the ship-yards and establishments at Maggia and Pirano, where military supplies had been collected and stored, and asserted that no bombs had been thrown into the city of Trieste, which was two and one half miles distant from the two places mentioned above. Austrian aviators had, on the contrary, it was charged, dropped bombs in the centre of Venice, which was an unfortified town, on the Piazza San Marco, damaging the famous church and other historic edifices, such as the Scalzi church with its Tiepolo frescoes and works of art.

<sup>1</sup> London weekly *Times*, September 29, 1916.

<sup>2</sup> New York *Times*, May 27, 1917.

<sup>3</sup> *Ibid.*, June 14, 1917. <sup>4</sup> *Ibid.*, August 13, 1917. <sup>5</sup> *Ibid.*, October 2, 1917.

<sup>6</sup> In March, 1918, a public statement was issued by the British government in which it was asserted that the number of non-combatants of British nationality who had lost their lives in consequence of German air raids over England down to February 13 was 1284 and the number of injured 3105. New York *Times*, March 14, 1915.

In the following month the Italian government complained of the bombardment by Austrian airmen of Verona, resulting in the death of thirty persons and the wounding of forty-nine others. The bombs, it was charged, were dropped in the market-place, where peasants from the country had come to sell their fruit and vegetables. Many of the victims were women and children, nineteen persons being killed by a single bomb. No military damage was done. Verona was reported as being a fortified place, but as to this the facts are not clear. In any case, the presence of fortifications or military works and depots would have been no justification for the dropping from an air ship of bombs upon the public square when it was filled with peaceful and unoffending peasants from the country.

The Italian government protested against the bombardment of both Venice and Verona, and the action of the Austrians aroused intense indignation throughout Italy. The affair at Verona in particular was denounced as an act of savagery and cruelty, and there was a widespread popular demand for reprisals against Austria.<sup>1</sup>

In February, 1916, Austrian aeroplanes made a raid over Ravenna and other towns in northeastern Italy, as a result of which fifteen persons were killed and a number wounded, including several women and children. A hospital and the basilica of an ancient church at Ravenna are said to have been damaged. Numerous other places were bombarded by the Austrians.<sup>2</sup> Milan was bombarded on February 13, 1916 and 16 persons were killed.<sup>3</sup> Venice was several times bombarded, and in March, 1918, three churches were struck and damaged, as were a hospital and various historical monuments.

§ 295. **Aerial Operations by Entente Aviators.** While the aerial "raids" of the Entente powers were much less numerous

<sup>1</sup> In August, 1918, the Italian poet d'Annunzio made an air raid upon Vienna and later one upon Pola as an act of reprisal against the Austrians for having dropped bombs upon Venice.

<sup>2</sup> The Pope in a letter to the Emperor of Austria expressed his earnest desire that the war might be conducted in accordance with international law and the principles of humanity and pleaded that open and undefended towns, historic monuments, sacred temples, and particularly the sanctuary of Lorette should be spared. He protested to the Austrian Emperor against the bombardments of Bari, Venice, Rimini, Ravenna, and Treves. He also protested against the dropping of bombs on the cathedral of Notre-Dame in Paris. Cf. Rolland in *Rev. Gén. de Droit Int. Pub.*, 1916, p. 547.

<sup>3</sup> 44 *Clunet*, p. 123.



in the early years of the war and the number of innocent victims comparatively few, there were some early instances of attack upon German towns, and charges of violation of the rules of international law by allied aviators were by no means lacking.

In November, 1914, French aviators bombarded the zeppelin sheds at Friedrichshafen, doing considerable damage to the establishment.<sup>1</sup> On August 25, 1915, a shell and munitions factory at Dillingen was bombarded by a French air ship, and 420 of the employees are said to have been killed.<sup>2</sup> In September, 1915, a French aerial attack was made upon Stuttgart. It was reported that the royal palace was badly damaged and that many civilians were killed. In November of the same year a "poisonous gas" factory at Darnach in Alsace was bombarded by French aviators and virtually destroyed, forty-two German employees, according to the reports, having been suffocated by the fumes resulting from the explosion. In January, 1916, a soldier and seven civilians were killed and thirty persons wounded as a result of an attack upon the city of Metz by French aviators. The bombs, it was alleged, were aimed at the railway stations and barracks.

During the same month a French dirigible made a raid upon the "open town" of Freiburg (in Baden) as an act of reprisal for the bombardment by a German zeppelin of certain villages in the vicinity of Epernay. According to the French version of the affair, the bombs were dropped only upon the railway station and the military works. On June 15 of the same year Karlsruhe, an "undefended" town like Freiburg, was bombarded by French aviators as an act of reprisal. Nineteen civilians are alleged to have been killed.

French airmen were also charged by the German authorities with having dropped bombs in April, 1915, on various undefended places in the Black Forest, killing men, women, and children and in several instances destroying schoolhouses. In the same month French aviators are said to have flown over Baden and dropped bombs on a group of children, three of whom were killed and several others wounded.

While air raids upon German towns were comparatively

<sup>1</sup> The bombardment took place, the French claimed, at an hour when the establishment was empty of its workingmen. Cf. the *Temps* of December 3, 1914.

<sup>2</sup> Rolland, p. 543.



rare during the first years of the war and a conscientious effort appears to have been made to confine bomb dropping to strictly legitimate objects of attack, after the Entente allies entered upon the policy of reprisals in 1918 the raids were much more frequent, and there was less attempt to confine the operations to defended towns or those which contained objects of military interest.

§ 296. **Summary of Results.** It is impossible to verify all the charges and countercharges made by each belligerent against his adversaries, but there is enough uncontroverted evidence, however, to establish the fact that in numerous instances open and undefended cities, towns, and villages were bombarded by air craft; that bombs were indiscriminately dropped in the streets, on the public squares, on churches, private houses, hospitals, orphanages, schoolhouses, and historic monuments in both defended and undefended places, and that large numbers of civilians, men, women, and children, lost their lives in consequence of this method of warfare. It is also clear that in the great majority of cases no military damage was done, or the damage was incidental or negligible and not in proportion to the injury inflicted upon the non-combatant population and upon private property. Only in exceptional instances were fortifications, military works, ammunition factories and depots, barracks, or naval establishments destroyed or injured, and only a very small percentage of the people killed were military persons. The German policy was probably based on the theory of "psychological effect" as defended by Bismarck during the siege of Paris in 1870.<sup>1</sup>

§ 297. **The Hague Rules regarding Aerial Bombardments.** When the First Hague Conference assembled, craft capable of

<sup>1</sup> Cf. the following from the *Essener Volkszeitung* of March 15, 1918: "Enemy ministers are endeavoring by every means to strengthen the *morale* of their peoples, that is to say, to keep up their warlike spirit and their will to conquer in order to prolong the war. Our desire is to shorten the war. To this end we intend to exercise upon the enemy a contrary influence. We shall endeavor to compel our adversaries to return to better sentiments. Now aerial bombardment is precisely a suitable means to attain this end. It promotes the movement for peace. This is why we cannot be satisfied with the success of our bombing raids. We shall not allow ourselves to be intimidated by hypocritical discourses which have as their theme 'German cruelties' and 'innocent victims.' It remains only to us to conquer by every means in our power the peace which is refused us." Quoted by Clunet in his *Journal de Droit Int.*, 45: 622.

navigating the air and of carrying bombs had not yet been invented, but the progress of aeronautic science fully justified the expectation that in the near future balloons capable of discharging bombs and torpedoes would be invented. The attention of the Conference was therefore directed to the consideration of this mode of warfare, and a declaration was adopted forbidding for a period of five years the discharge of projectiles and explosives from balloons or by other new methods of a similar nature. An article (No. 25) was also added to the convention respecting the laws and customs of war on land, forbidding the bombardment of undefended towns, villages, habitations, and buildings. During the period intervening between the First and Second Hague Conferences progress in the art of aerial navigation was notable, and the question of aerial warfare received the careful attention of the Second Conference, which renewed the prohibition of 1899 in respect to the discharge of projectiles and explosives from balloons, the duration of the period being limited, however, to the close of the Third Conference. But it is significant that many States which in 1899 approved the prohibition, declined to do so in 1907, thus indicating their unwillingness to surrender the advantages of a mode of warfare the possibilities of which had been fully demonstrated since the First Conference. In fact, only about one-half the States represented at the Second Hague Conference signed the declaration, and among those which refused were Germany, France, Russia, Spain, Italy, Japan, and Sweden. The declaration cannot therefore be regarded as a universally binding rule; certainly it was not binding upon Germany. Nevertheless, while the Second Conference was unwilling to forbid entirely the discharge of bombs from air craft, there was a general agreement in favor of imposing restrictions upon this mode of warfare. Both the Italian and Russian delegations proposed, in place of the temporary renewal of the prohibition of 1899, a declaration prohibiting the discharge from balloons of projectiles or explosives against undefended towns, villages, houses, or dwellings. This proposal was not adopted as a substitute for the declaration prohibiting the launching of projectiles or explosives from balloons, but it found its way into the convention respecting the laws and customs of war on land, article 25 of which reads: "The attack or bombardment by

*any means whatever* of towns, villages, habitations or buildings which are not defended is forbidden." This article was in effect a renewal of article 25 of the convention of 1899, with the addition of the words "by any means whatever," which clearly covers aerial bombardments, as it was undoubtedly intended to do.<sup>1</sup> These words were added upon motion of the French delegation in order to remove all doubt as to the illegality of aerial attacks upon undefended places,<sup>2</sup> and unlike the prohibition in regard to the dropping of projectiles or explosives from balloons or other air craft, it is of unlimited duration. Technically, however, this prohibition was not binding on any of the belligerents during the recent war, because five of them (Italy, Bulgaria, Montenegro, Servia, and Turkey) had not ratified the convention in accordance with the general participation clause (article 2). But it may be, and in fact has been argued that the prohibitory clause was merely declaratory of an existing rule of customary law and was therefore binding independently of the status of the convention.<sup>3</sup> Moreover, the convention of 1899 respecting the laws and customs of land warfare, article 25 of which forbids the bombardment of undefended places, was binding upon the parties which ratified it, but which had not ratified the convention of 1907. It is true that the convention of 1899 relates to land warfare only, and that the prohibition in respect to bombardments did not contain the words "by any means whatever," but it may with reason be contended that it forbade aerial as well as artillery bombardments of undefended places.<sup>4</sup>

§ 298. **Recent Discussion of the Question.** Discussion of the question was provoked in England prior to the outbreak of the war by an address of Colonel Jackson, of the Royal Corps of Engineers, on April 22, 1914, in which he stated that in the

<sup>1</sup> See *La Seconde Conférence Internationale de la Paix, Actes et Documents*, T. III, p. 16; Lémonon, p. 386, and Holland, *Letters on War and Neutrality*, p. 55. Cf. also Kuhn, *Beginnings of Aerial Warfare*, *Amer. Jour. of Int. Law*, January, 1910, p. 121, and Clunet, *De l'Emploi Abusif des Aérostats de Guerre par les Allemands*, in *Clunet's Jour. de Dr. Int.*, 43: 389 ff.

<sup>2</sup> This purpose is so declared in the French manual, *Les Lois de la Guerre Continentale*, art. 59.

<sup>3</sup> Cf. Fauchille, *Les Attentats Allemands contre les Personnes, etc.*, in the *Rev. Gén. de Droit Int. Pub.*, Vol. 22, pp. 403 ff.; Rolland, *ibid.*, Vol. 23, p. 509, and Pillet, *ibid.*, Vol. 23, p. 21.

<sup>4</sup> Cf. Pillet, article cited, p. 21; Rolland, p. 513, and Spaight, p. 14.

wars of the future, air ships would drop bombs on coast batteries, dock-yards, magazines, ammunition factories, oil reservoirs, wireless stations, and great centres of population.<sup>1</sup> London, according to Colonel Jackson, could not be considered as an undefended city for the reason that it was a seat of military stores and barracks and was prepared to offer resistance. The commander of an enemy's war balloon, he said, might arrive over London and signal as a matter of courtesy: " ' I am going to drop explosives.' We answer: ' You must not drop explosives; we are not defended.' The commander replies, as it seems to me quite logically, ' then you must surrender. Good. You will now obey orders.' " Professor Holland replied, in a letter published in the *London Times*,<sup>2</sup> that the words " ' by any means whatever ' were added to article 25 deliberately and after much discussion, for the purpose of preventing just such attacks from air ships upon undefended localities among which I consider that London would unquestionably be included." In a subsequent letter<sup>3</sup> he seemed less certain of his position, for he asked " whether a great centre of population like London can claim to be undefended when it contains barracks, stores, and bodies of troops." " For the affirmative answer," he said, " I can vouch for the authority of the Institute of International Law, which at its meeting of 1896 adopted a statement to this effect." But the views of the Institute are not necessarily those held by the authorities on military law or the writers on international law. Both the British and German war manuals recognize the liability to bombardment of places occupied by troops, even though they are not fortified.<sup>4</sup>

<sup>1</sup> Spaight, *Air Craft in War*, p. 12. Sir Thomas Barclay in an article in the *English Review* for May, 1915, concluded that the military and naval establishments of London, railway stations, wireless installations, munitions depots, military workshops, and the like were liable to aerial bombardment. Cf. also Phillimore in the *Pubs. of the Grotius Society*, Vol. I, p. 64. Baron Montagu of Beaulieu said in the House of Lords on June 26, 1917, during the course of a debate on the subject of air reprisals that it was " absolute humbug " to talk of London being an undefended town, and he declared that the Germans had a perfect right to raid it. *New York Times*, June 27, 1917.

<sup>2</sup> April 25, 1914, p. 10. Cf. also his *Letters on War and Neutrality*, pp. 101, 115.

<sup>3</sup> *London Times*, May 5, 1914, p. 10.

<sup>4</sup> *British Manual*, art. 119; the German *Kriegsbrauch im Landkriege* (Carpentier's translation, p. 44).

Spaight, an English writer,<sup>1</sup> holds that bombs may lawfully be dropped upon military stores and depots, in undefended as well as defended towns, and, for practical reasons peculiar to aerial warfare, the notifications or warnings required by the naval convention may be dispensed with. In regard to the liability of London to bombardment, he says: <sup>2</sup>

"I can see nothing in international law to prevent an hostile air craft force from dropping bombs on Chelsea, Wellington, Albany, or Knightsbridge barracks, or on the clothing factory or depot at Pimlico, or on Euston, Kings Cross, Waterloo, and other great railway termini. Many commercial undertakings which hold orders for the war department or admiralty would be liable to bombardment also. So probably would the war office and the admiralty and the headquarters of the eastern command and the London district. The various territorial force headquarters all over London also appear to be possible legitimate objects of attack."

§ 299. When is a Place "Defended" against Aerial Bombardment? It may very well be doubted, however, whether the distinction between a "defended" place and an "undefended" place, as those terms are used in land warfare, is a reasonable and logical test for determining liability to bombardment by an air ship. The test applied in land and naval warfare is reasonable enough and is based on practical considerations. But no place can really be said to be "defended" as against bomb-dropping from airships, by the mere presence of troops or ordinary artillery or the existence of fortifications. To be defended in any real sense against aerial attacks a town must possess artillery especially constructed for bringing down air craft.<sup>3</sup> Reason and logic, therefore, would seem to require that the rule of the Hague convention, which inferentially allows a "defended" place to be bombarded by air craft, should be interpreted to apply only to places which are in fact supplied with modern guns designed especially for the destruction of air craft and not to those which are merely occupied by troops

<sup>1</sup> *Air Craft in War*, p. 18.

<sup>2</sup> *Air Craft in War*, p. 20. Spaight adds: "It seems to me, therefore, that a belligerent would be justified in interpreting 'undefended' in the Hague rules as meaning 'not occupied by troops or otherwise in a position to offer armed resistance' and that such a city as London cannot rely for immunity against attack, on article 25 of the land war *réglement* or on the corresponding article of the convention on naval bombardments." *Ibid.*, p. 16.

<sup>3</sup> Cf. Hazeltine, *Law of the Air*, p. 123; also Fauchille, *Le Bombardement Aérien*, *Rev. Gén. de Droit Int., Pub.*, Vol. 24 (1917), p. 73.

or equipped with artillery for resisting attack by land or naval forces.

As Fauchille points out, the objects of aerial bombardment are different from those of land and naval bombardment. In the latter case the purpose is to compel the place against which it is directed to open its gates so that the attacking party may enter and occupy it, whereas the object of aerial bombardment is merely the destruction of the place or certain objects within its borders. The fact that an aviator cannot by means of bombardment capture a place with a view to occupying it gives him no more right to destroy private property and kill inoffensive citizens than a military or naval commander has. It is, of course, lawful for him to attack troops which may be in occupation of a place or to destroy property of military value even in an undefended place, but his obvious inability to distinguish from a great height between such persons and property and those which are exempt from attack affords no justification for launching bombs on all parts of the town without discrimination.

M. Fauchille, who has given much attention to the subject of aerial warfare, proposes the following rule, among others, to govern aerial bombardments: It is permitted to bombard from the air, in all places, whether they be fortified, defended, or occupied by troops or not, only military works, military or naval establishments, depots of arms or war materials, shops and installations suitable for use by the enemy army or fleet, ships of war, the chief of the government or his representatives, soldiers and other persons officially attached to the army or fleet and whose status is not regulated by the Geneva convention. Inoffensive citizens, as well as private property and public property not connected with the seat of government and which is not employed for military purposes or which has no strategic importance, should as far as possible be spared. An aviator who violates this rule, if caught, should be liable to punishment according to the criminal law of the State in whose service he is employed and should be required to pay an indemnity; his act might also be made an object of reprisal by the adverse party.<sup>1</sup>

<sup>1</sup> Article cited, p. 73. This is in substance the rule of the French manual (art. 63).



This would seem to be a reasonable rule which reconciles the rights of belligerents with those of the civil population. It allows bombardment of persons and property which have a military character, but exempts non-combatants and private property from attack. But obviously the observance of the distinction between the two classes of persons and property would in practice be very difficult, if bombardment is resorted to at all, and in any case, the belligerent could easily avoid the obligations of the rule by dropping bombs in any part of the town and then alleging that he earnestly endeavored to spare the persons and objects which were not liable to attack. -

§ 300. **Is it the Duty of an Aviator to Give Warning of an Intended Bombardment?** This preliminary is required in the case of land and naval bombardments, except in case of assault,<sup>1</sup> but it would hardly seem to be applicable to bombardments from the air. Is the dropping of bombs from air craft "bombardment" in the sense in which the term is used in the land and naval conventions? The purpose of the requirement in respect to notice is to give the inhabitants an opportunity to surrender and allow the enemy to enter and occupy the place, but since the object of aerial bombardment is destruction simply and not with a view to occupation, the same consideration which makes preliminary notice in the former case advisable does not exist in the latter case. Moreover, the element of surprise ordinarily plays no part in land or naval bombardments, whereas it may be an essential condition to a successful aerial attack. To require warning, therefore, in such a case would greatly diminish the effectiveness of the air ship as a weapon of destruction.<sup>2</sup>

§ 301. **Violations of Neutrality by Belligerent Air Craft.** On numerous occasions during the late war air ships of bellig-

<sup>1</sup> In the case of naval bombardments the attacking party is required to warn the inhabitants "if the military situation permits"; in the case of land bombardments he is required "to do all in his power to warn the inhabitants before commencing the bombardment except in case of assault." Lémonon (*op. cit.*, p. 521) aptly remarks that the language here employed authorizes a belligerent to violate the most elementary rule governing bombardments.

<sup>2</sup> Cf. Fauchille's article, *loc. cit.*, pp. 72-73. Among the rules governing aerial warfare which Fauchille proposes is one to the effect that preliminary notice of an attack shall not be required. Spaight also considers that the notification required in the case of land and naval bombardments may be dispensed with in aerial warfare.



erent nationality during the course of their raids upon the enemy passed over the territory or marginal waters of neutral States; more than once they dropped bombs upon towns and villages in neutral countries, and occasionally they landed upon neutral soil either voluntarily or in consequence of *force majeure*.

One of the earliest instances of the kind occurred in October, 1914, when certain German aviators during the course of a raid on Belfort flew over Swiss territory.<sup>1</sup> In the following month, British and French aviators flew over Swiss territory for the purpose of attacking the zeppelin establishment at Friedrichshafen. On November 26 Mr. Churchill, first lord of the admiralty, stated in the House of Commons that the violation of Swiss territory by the British and French aviators in this case was probably due to an error, since it was almost impossible for an aviator flying at a high altitude to determine the course which he was taking. British airmen, he added, had received explicit instructions to avoid sailing over neutral territory.<sup>2</sup> Between December 1, 1914, and May 15, 1916, according to a report presented to the Federal Assembly of the Swiss Confederation by the Federal Council, twenty-four cases of the violation of Swiss territory by belligerent aviators occurred. Fourteen of these aviators were Germans, six were French, one was English, one was Italian, and the nationality of the other one was unknown.<sup>3</sup> The most serious of these infractions was the action of German aviators in dropping eight bombs upon the Swiss village of Chaux-de-Fonds on October 17, 1915, the result of which was the killing of a child, the wounding of three other persons, and the infliction of some damage upon property. Another incident, less grave in its results, was the bombardment by German aviators on March 31, 1916, of the Swiss town of Porrentruy near the French frontier, resulting in some damage to property.<sup>4</sup> These acts provoked considerable indignation in Switzerland, and the Swiss government addressed a vigorous protest to the German government against these grave infrac-

<sup>1</sup> Paris *Temps*, September 4 and October 29, 1914.

<sup>2</sup> New York *Times*, November 27, 1914.

<sup>3</sup> Cf. Rolland, pp. 507-568, where the particular instances are mentioned. In August, 1916, the Swiss authorities stated that German aeroplanes had violated the neutrality of Switzerland twenty times. New York *Times*, August 9, 1916.

<sup>4</sup> Accounts of these attacks were published in the *Journal de Genève* of October 19 and 21, 1915, and April 16, 1916. Cf. also Rolland, pp. 506, 568-569.

tions of its sovereignty, which had been committed, it was added, in violation of solemn assurances given earlier during the war that German aviators had been instructed not to approach within three miles of the Swiss frontier.<sup>1</sup> The German government expressed its "deepest regret" for the dropping of bombs at Chaux-de-Fonds, stated that the aviators had been dismissed from the service, and again gave assurances that German aviators had been forbidden to fly within the region adjacent to the Swiss frontier.<sup>2</sup> An indemnity also appears to have been paid for the material damage caused by the dropping of the bombs.<sup>3</sup> A somewhat similar case occurred on June 21, 1916.<sup>4</sup>

On April 26, 1917, a French aviator through error, it was claimed, flew over and bombarded the Swiss town of Porrentruy, damaging several buildings and injuring three persons. The French government promptly expressed its regret for the occurrence, offered a suitable indemnity, and gave assurance that the affair would be investigated and the aviator punished as soon as the facts were established.<sup>5</sup> On December 7, 1917, a fight took place between German and allied aviators over Swiss territory in the neighborhood of Basle. It appears that the Germans, being hard pressed by their opponents, flew over Switzerland in the hope of escaping. The battle took place at great height and lasted twenty minutes, during the course of which seven bombs were dropped upon Swiss territory. Both combatants were fired upon by Swiss anti-air craft guns, but without effect.

Shortly after the outbreak of the war the Swiss government had informed the governments of the neighboring belligerent States that the flying over Swiss territory by foreign aviators was strictly forbidden, and that every effort would be made by the authorities to oppose the passage of such aviators. At the same time the military authorities of the Confederation were

<sup>1</sup> *New York Times*, April 2 and 29, 1916.

<sup>2</sup> *Ibid.*, October 26, 1915, and April 30, 1916.

<sup>3</sup> Rolland, p. 506. The explanation given by the German government for the bombardment of Porrentruy was that the aviator had lost his way and believed that he was over Belfort.

<sup>4</sup> The German government explained that the aviator had lost his way; nevertheless, he had been traduced before the courts for trial and punishment.

<sup>5</sup> Paris despatch in the *New York Times* of May 6, 1917.

instructed to fire upon any foreign aviator guilty of violating this order, and after the affair at Porrentruy these instructions were made more stringent.

§ 302. **Violations of Dutch Neutrality.** Both the territory and marginal waters of Holland were exposed to violation by British and German aviators, owing to the fact that Holland lay on the most direct route between Germany and the occupied portion of Belgium on the one side and England on the other.

The Dutch government at the beginning of the war, like that of Switzerland, took the position that the passage over its territory by air craft in the service of either belligerent would be a violation of the neutrality and sovereignty of the country; it therefore announced that such passage would be opposed by force, and instructions were given to the military authorities to fire upon all air craft found passing through the aerial domain above the land or territorial waters. During the months of September, October, November, and December, 1914, several cases were reported of German zeppelins flying over the territory or marginal waters of Holland,<sup>1</sup> but the government does not appear to have protested, nor was any attempt made by the military forces to bring down the violating aviators. The situation took a new turn early in 1915, however, when the German aviators began to violate systematically the neutrality of the country, as the government considered it, by passing over Holland on their way to and from England in the course of their raids upon that country. Thereupon the Dutch government addressed a protest to the German and British governments,

<sup>1</sup> The instances are mentioned in Rolland, p. 573, n. 2. In a communication of September 23, 1915, the Dutch government complained that two German zeppelins had passed over the territory of the Netherlands on September 8; that this was a serious infraction of the neutrality of the country; that it was evidently deliberate and done with a view to reaching as quickly as possible the occupied territory of Belgium, and that the Dutch government could not accept the excuse of mistake as a sufficient defence. At the same time it reminded the German government of its repeated assurances that strict orders had been given to German aviators to refrain from flying over the territory of neutral States. Text in the Dutch orange book *Overzicht der voornaamste van July 1914 tot October 1915 door het Ministerie van Buitenlandsche Zaken behandelde en voor openbaarmaking geschikte aangelegenheden*, pp. 26-27. In a note of March 18, 1916, the Dutch government complained that the German dirigible L-19 had on February 1 flown over the territorial waters of the Netherlands. Cf. also the correspondence in the Dutch orange book *Mededeelingen van den Minister van Buitenlandsche Zaken aan de Staten Generaal, Juli-Dec., 1916*, pp. 24 ff.

and at the same time the military authorities adopted the practice of firing upon air ships which came within their range. In several instances they were brought down by well-directed shots, and their crews and officers were interned. Some, indeed, voluntarily landed upon Dutch territory when closely pursued, preferring internment to possible destruction. As in the case of the Swiss violations, the German government expressed regret for the action of its aviators and again alleged that the infractions were the result of error, the violence of the winds, defective motors, and the like. In one or two cases it was even asserted that the offending aviators would be punished. In October, 1915, the Dutch authorities adopted the expedient of permitting the despatch of warning telegrams to England announcing the approach of German zeppelins which were guilty of passing over Dutch territory, and the expedient is said to have been fairly effective in deterring German aviators in the future from flying over the Netherlands in the course of their raids upon England.

Loud complaints were made in Germany against the action of the Dutch coast guards in firing upon the zeppelin L-19 during the course of a return voyage from England and causing it to fall into the sea. In consequence of the refusal of the British trawler *King Stephen* to take aboard the crew and passengers they were drowned. The German protest was based on the ground that the zeppelin was in a disabled condition and was at the time endeavoring to land on Ameland Island. It was, therefore, in a position of a disabled war ship driven by stress of weather or unseaworthiness to seek shelter in a neutral port and was entitled to the same hospitality.

In a reply of March 18 (1916) to a protest of the German government dated February 17 the government of the Netherlands stated that the German government had given assurances that its aviators had received strict orders not to fly over neutral territory; that notwithstanding these orders they had continued to violate many times the neutrality of the Netherlands; that the only way by which they could avoid mistake or the consequences of *force majeure* was to keep a sufficient distance away from the Dutch frontier; that it was the right and duty of neutral governments to prevent by force if necessary the passage of belligerent air craft over their territory, and that the dirigible L-19 did not manifest by signal or otherwise its intention to

land on Dutch territory or give any indication that it was in distress, but continued its course with full knowledge that it was violating the neutrality of the country. Under these circumstances it was the duty of the military authorities to use the means at their disposal to bring it down.<sup>1</sup>

The case of the zeppelin L-19, however, was not analogous to that of a disabled or unseaworthy war ship. A war ship engaged in navigating the high seas, and which is not in any way violating the sovereignty of a neutral State but which is driven by stress of weather or unseaworthiness to seek refuge in a neutral port, is in an entirely different position from an aeroplane which, according to the admitted principles of international law, is engaged in violating the neutrality of a State. The Dutch authorities had a right to resist the passage of the L-19 over their territory, and they had repeatedly warned the German government of their intention to fire upon air craft engaged in such practices. The Dutch authorities would seem, therefore, to have been within their rights in firing upon the L-19 and in bringing it down.

A somewhat different controversy was raised between the governments of Great Britain and the Netherlands in consequence of several British sea planes having been forced to descend in the North Sea, and the crews and *matériel* of which were brought within the jurisdiction of the Netherlands. The Dutch government admitted that there was no general rule of international law requiring the internment of the crews of shipwrecked sea planes who might be rescued and brought within the jurisdiction of a neutral State, and in fact the officers and crews of the sea planes in question were released and sent home. But, on the other hand, it contended that this rule did not apply in the case of war material salvaged from the sea. Indeed, to restore such material would be incompatible with the duties of neutrality laid down in article 6 of the thirteenth Hague convention of 1907 prohibiting the supplying directly or indirectly by a neutral to a belligerent of war ships, munitions, or war material. To this view Mr. Balfour replied that article 6 had reference only to the supply of war material owned by the

<sup>1</sup> Text of the note in the Dutch orange book *Overzicht vaneenige in het tijdvak October 1915 tot Juli 1916 door het ministerie van Buitenlandsche Zaken behandelde aangelheden*, pp. 26-27.

neutral and not to property rescued by a neutral from a shipwrecked vessel. There was no question, he said, of the Dutch government's furnishing any of the articles salvaged to the British government, but rather the refraining from "impounding goods which no rule of international law required them to seize."<sup>1</sup> This would seem to be a reasonable interpretation of the Hague provision.

On May 7, 1917, German aeroplanes again violated the neutrality of the Netherlands by flying over the territorial waters of the country. The Dutch minister at Berlin was instructed to protest vigorously against the act. During the same month a German aeroplane dropped bombs upon the Dutch town of Zierikzee killing three persons and doing extensive material damage. The Dutch government charged that the bombs were not launched by mistake but purposely. On August 18 another German air squadron flew over Dutch territory and dropped a number of bombs. The Dutch government protested; again the German government alleged that the aviators had lost their way in the clouds, and it expressed regret at the occurrence. The explanation, however, was not satisfactory and the protest was renewed.<sup>2</sup> In December, 1917, five bombs were dropped by a German zeppelin on the town of Goes in the province of Zeeland damaging several houses and injuring one of the inhabitants.<sup>3</sup>

§ 303. **Other Instances Charged.** The neutrality of other States, notably Denmark, Norway, and Sweden, was at various times violated by the passage of air ships of German nationality over their territory or marginal waters. The Swedish government in July, 1916, issued a formal prohibition against the passage over Swedish territory of foreign air craft without the permission of the government. The Danish government likewise protested against violations of Danish territory by foreign aviators and it was reported that Danish troops fired upon offending aviators

<sup>1</sup> *Journal of Comparative Legislation and International Law*, new series, No. XL (April, 1918), p. 153.

<sup>2</sup> *New York Times*, August 27, 1917. The Dutch government also charged German aviators with having several times deliberately dropped bombs on Dutch ships on the high seas. Cf. the Dutch orange book *Recueil de Diverses Communications du Ministère des Affaires Étrangères aux États-Généraux par Rapport à la Neutralité des Pays-Bas et au Respect du Droit des Gens*, pp. 123-125.

<sup>3</sup> *New York Times*, December 24, 1917.



in several instances for the purpose of warning them, if not for the purpose of bringing them down. The German government expressed regret in some instances and offered the usual excuse that the violations were due to error.<sup>1</sup>

The bombardment by British and French aviators of the town of Luxemburg<sup>2</sup> and the bombardment of Saloniki by German and Austrian aviators, both being neutral towns, fall within a somewhat different class from the other cases mentioned above. The government of the Grand Duchy of Luxemburg addressed a protest to the governments of Great Britain and France, but they took the position that Luxemburg was not in fact neutral but, like Belgium, was occupied by the German forces, the city having been made the seat of the German headquarters. It was, therefore, as much a legitimate object of attack as Brussels or Liège.

§ 304. **The Law Governing Aerial Navigation over Neutral Territory.** Is it a violation of neutrality for a belligerent air ship to pass through the aerial domain above a neutral State? May the aeroplanes of opposing belligerents engage each other in battle over neutral territory? If not, have belligerent aeroplanes a right of innocent passage? The answer to these questions involves a consideration of the question whether the sovereignty of a State extends indefinitely or to a limited height over the superincumbent aerial domain and, if so, whether its sovereignty is absolute or subject to restrictions. The progress of aeronautical science and the successful employment of air craft for belligerent purposes had caused the question to assume great practical importance, and it has provoked a flood of discussion in recent years by jurists and learned societies. Already there is an extensive literature on the subject,<sup>3</sup> and various

<sup>1</sup> Rolland, p. 575. In November, 1917, the Spanish government is reported to have issued a warning that it would regard the passage of *American* aeroplanes over Spanish territory as a violation of the neutrality of the country and would instruct the military to fire on such aeroplanes.

<sup>2</sup> The Germans charge that the bombardment was not limited to legitimate objects of attack, but included the whole city, and that many of the bombs fell in the most crowded sections of the city. In October, 1915, French aviators bombarded the city, but the French government claimed that the bombs were dropped on the railway stations, a railway bridge, and upon certain military buildings.

<sup>3</sup> Cf. especially Spaight, *Air Craft in War*; Hazeltine, *Law of the Air*; Lycklama, *Air Sovereignty*; Banet-Rivet, *L'Aéronautique*; Phillit, *La Guerre Aérienne*;



codes of aerial law have been drafted and prepared by distinguished writers and bodies like the Institute of International Law.

§ 305. **Theories of the Jurists and Text Writers.** The theories of the text writers regarding the legal nature of the aerial domain and the rights of subjacent states over it may be grouped into the following classes:

1. Those who assert that the air is or should be absolutely free for purposes of aerial navigation by aviators of all countries. Among those who have contended for this principle are Wheaton, Bluntschli, Pradier-Fodéré, Fiore, Stephen, and Nys.

2. Those who assert the general principle of the freedom of the air subject to a certain right of control by the subjacent State over the super-incumbent atmosphere up to a certain height. This area they call the "territorial zone." Among those who take this view are Fauchille (who fixes the height of the zone at 1500 metres), Rolland, Bonnefay, Merignhac, Gareis, Despagnet, and Oppenheim.

3. Those who advocate the general principle of the freedom of the air, but allow the underlying State to exercise control over it up to an indefinite height for purposes of self-protection and preservation. In this category are found Stranz, Meili, and the Institute of International Law.

4. Those who contend for the absolute sovereignty of the underlying State for any and all purposes over the aerial domain above its territory. In this group are Rivier, Piétri, von Liszt, von Holtzendorff, Chrétien, Hilty, and von Bar.

5. Those who contend for the principle of absolute sovereignty subject to the right of free passage. Among the exponents of this view are Grünwald, Meurer, A. Meyer, Ullmann, Zittelmann, Cattelani, Westlake, Hazeltine, Holland, Baldwin, Kuhn, Wilson, Hershey, Lycklama, and

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Julliot, *De la Propriété du Domaine Aérien*; Loubeyre, *Les Principes du Droit Aérien*; Meili, *Das Luftschiff im Internen Recht und Völkerrecht*; Meurer, *Luftschiffahrt Recht*; Catellani, *Le Droit Aérien*; *International Law Situations*, 1905, pp. 135-138; *ibid.*, 1912, pp. 56-92; Davis, "The Launching of Projectiles from Balloons," *Amer. Jour. of Int. Law*, Vol. II, p. 528; Baldwin, "Law of the Air Ship," *ibid.*, Vol. 4, pp. 95-108; Kuhn, "Beginnings of Aerial Law," *ibid.*, pp. 109-133; Lee, "Sovereignty of the Air," *ibid.*, Vol. 7, pp. 470-496; Fauchille in the *Rev. Gén. de Droit Int. Pub.*, 1901, p. 414; *ibid.*, 1910, pp. 55 ff; *ibid.*, 1917, pp. 56 ff., and his various reports to the Institute of International Law, *Annuaire*, Vol. 19, pp. 19 ff.; Vol. 21, pp. 76 ff.; Vol. 25, pp. 297 ff.; Rolland, *Les Pratiques de la Guerre Aérienne*, *Rev. Gén. de Droit Int. Pub.*, 1916, pp. 497 ff.; also his *Télégraphie sans Fil et le Droit des Gens*; Picciotto, *Notes on Air Warfare*, *Jour. of the Soc. of Comp. Leg.*, 1915, pp. 150 ff.; Phillimore, *Pubs. of the Grotius Society*, Vol. I, pp. 61 ff.; Barclay, *English Review*, May, 1915; Clunet, Vol. 42, p. 814, and Vol. 43, p. 385; Zittelmann, *Zeitschrift für Int. Privat und öff. Recht*, Vol. 19, pp. 458 ff.; Grünwald, 24 *Archiv. für öff. Recht*, p. 110.

many others.<sup>1</sup> This is the view embodied in the convention relating to international air navigation, agreed to by the representatives of the allied and associated powers at the Peace Conference in 1919.

It is impossible to review here the arguments put forward by each group of writers in support of the particular theory which it advocates. It is sufficient to say that some of their theories are impracticable and others are inadmissible on grounds of public policy. This is manifestly true of the theory of absolute freedom championed for the most part by the older writers like Wheaton, Bluntschli, and Pradier-Fodéré, who wrote before the possibility of aerial navigation had been demonstrated. Professor Hazeltine, an English jurist who has given much attention to the subject, justly remarks that this theory will never be seriously considered by jurists or States, and he points out that the analogy between the sea and the air upon which its advocates mainly rely will not hold.<sup>2</sup> On the other hand, the theory of the absolute sovereignty of the subjacent State over the superincumbent aerial domain is not only impracticable because it is incapable of being exercised, but because if the air were susceptible of control, there are many reasons why its innocent navigation should not be dependent upon the will of a single State.<sup>3</sup>

M. Fauchille, the distinguished editor of the *Revue Générale de Droit International Public* and one of the most prolific writers on aerial law, maintains that the air is free and subjacent States have no right of control over it, further than what may be

<sup>1</sup> The views of various writers are classified and discussed by Loubeyre in his *Les Principes du Droit Aérien* (1911), pp. 148 ff.; by Lycklama, *Air Sovereignty* (1910), pp. 11 ff.; by Hazeltine, *Law of the Air*, ch. II, and Philet, *La Guerre Aérienne* (1910), pp. 21 ff. A valuable review of the literature and a summary of the views of recent writers may be found in an article entitled *Sovereignty of the Air* by Blewitt Lee, *Amer. Jour. of Int. Law*, Vol. VII, pp. 470 ff.

<sup>2</sup> *Law of the Air*, p. 14. Loubeyre (*op. cit.*, p. 151) also points out that the analogy is not sound. To the same effect cf. Lycklama, pp. 25 ff.

<sup>3</sup> The air convention referred to above recognizes that "every State has complete and exclusive sovereignty in the air space above its territory and territorial waters," but each State undertakes in time of peace to accord freedom of innocent passage subject to the observance of certain conditions. But when during the war the British government apologized to the Swiss government for the act of an aviator in flying over Swiss territory it took occasion to say that "such expressions of regret for the non-observance of instructions are not to be interpreted as recognition by the British government of the existence of a sovereignty of the air." *London Times*, December 8, 1914.

necessary for their self-preservation. The air, he points out, is incapable of appropriation by States, and it is impossible for them to subject it to their sovereignty, although he recognizes that they may lawfully prohibit navigation below a certain height. But they have no right to forbid foreign air craft, even of belligerent nationality, from passing over their territory above a certain altitude.

But Spaight, an English writer, in his proposed code would forbid belligerent military air craft from passing over the land or territorial waters of a neutral State. It is, indeed, the duty of neutral States, he says, to exercise due diligence to prevent their aerial domain from being used by belligerents for purposes of observation or the conduct of hostilities. Adverting to Fauchille's contention that if the right of passage over neutral States were not allowed the air craft of a belligerent State which is separated from the enemy by neutral territory and which has no sea frontage would be unable to carry on aerial warfare against the enemy, Spaight points out that this is precisely the situation as regards the passage of troops by land, a right which does not exist. There is no more reason, he argues, why the air craft of a belligerent should be permitted to pass through the aerial domain of a subjacent neutral State in order to attack an enemy than that his troops should be allowed to march across its territory for the same purpose.

§ 306. Views of the Institute of International Law. The question has been much discussed by the Institute of International Law at various meetings since 1900, notably in 1906 and 1911, and numerous reports, counter reports, observations, and draft projects have been submitted. At the Madrid meeting of 1911 four sessions were devoted to the considerations of Fauchille's elaborate *projet*, and the discussion only served to reveal the wide differences of opinion which were held. Fauchille, as has been said, advocated the principle of freedom of navigation, subject only to the right of subjacent States to exercise such control as may be necessary to their self-protection and security. His proposed code, however, made a distinction between the rights of military air craft and those of other air craft. The former were to be allowed to fly over the territory of other States only with their consent, and in time of war they were to be prohibited from engaging in hostile operations which

would involve the dropping of bombs or projectiles, or from other acts which might cause damage to the property or persons of the inhabitants. Holland apparently was of the same mind.<sup>1</sup> Kaufmann, a German jurist, also favored a prohibition upon belligerent air craft from flying over neutral territory even for the purpose of observation, and neutrals should have the right to prevent such acts.<sup>2</sup> Von Bar and Lemoyne advocated a similar prohibition.<sup>3</sup>

The rule adopted by the Institute declared the international circulation of the air to be free, subject to the right of States to take measures to insure their security and that of the persons and property of their inhabitants. In time of peace as well as in time of war States have only such rights over the international circulation of the air as are necessary for their protection.<sup>4</sup>

The meaning of this resolution is not clear, but apparently it allows the right of passage of belligerent air craft over neutral territory, subject to the right of the subjacent neutral State to prohibit it when in its judgment considerations of national safety and protection make it advisable. Practically all writers are now agreed that neutrals have a right to forbid belligerent air craft from flying over their territory and marginal waters,<sup>5</sup> and neutral governments acted on this principle during the recent war. So far as is known, no belligerent contested this right, and in every case where one of its aviators was guilty of such violations without sufficient excuse regrets were expressed and where damage was done indemnities were paid.

§ 307. **Other Questions Affecting Neutrals.** But whether it is the *duty* of a neutral to forbid belligerent air craft from flying over its territory and especially for the purpose of making observations or engaging in hostilities with the enemy, there is a difference of opinion. Some writers, like Spaight and Lycklama, maintain that such is their duty, but obviously it would

<sup>1</sup> *Annuaire de l'Institut* (1906), Vol. 24, p. 138.

<sup>2</sup> *Ibid.*, p. 159.    <sup>3</sup> *Ibid.*, p. 132.

<sup>4</sup> *Ibid.*, p. 107.

<sup>5</sup> The air convention of 1919 referred to above lays down the rule that "each contracting State has the right, for military reasons or in the interest of public safety, to prohibit the air craft of the other contracting States, under the penalties provided by its legislation and subject to no distinction being made in this respect between its private air craft and those of the other contracting States, from flying over certain areas of its territory" (art. 3).

often be impossible of performance, and the neutral ought not to be held responsible for failure to do so in such cases.

Is it the duty of belligerents to refrain from conducting hostile operations over neutral territory? Some authors, like Fauchille, would forbid fighting while allowing the right of innocent passage.<sup>1</sup> But can navigation by a belligerent airship over neutral territory in time of war be regarded as "innocent" under any circumstances? It is doubtful. Fauchille, however, while recognizing what he calls the right of innocent passage, would forbid belligerent air craft from hovering above neutral territory within a certain distance of enemy territory for purposes of observation, because it would be liable to be fired on by the enemy, thus exposing neutral persons and property to danger, which would not happen in the case of innocent passage.<sup>2</sup>

Some writers, however, deny even the right of passage to belligerent air craft, this on the principle that, if allowed, hostilities between opposing aviators would probably take place, thus exposing the inhabitants to the danger of falling projectiles and disabled air ships.<sup>3</sup>

§ 308. **Legality of the Aeroplane as an Instrument of Combat.** The question of the legitimacy of air craft as an instrument of warfare was the subject of extended discussion at the Madrid session of the Institute of International Law in 1911, and the view was expressed by a considerable number of distinguished jurists there present that the employment of air ships for launching projectiles and explosives ought to be prohibited and their use confined to such operations as the making of observations, transmission of despatches, reconnoissances, and the like. In short, their employment as instruments of combat should be interdicted. Among those who expressed this opinion were von Bar and Meurer of Germany, Alberic Rolin of Belgium, Fiore of Italy, and Holland and Westlake of England.<sup>4</sup>

<sup>1</sup> This is apparently also Philet's view, *op. cit.*, p. 38.

<sup>2</sup> *Annuaire*, Vol. 24, p. 60. The same view is apparently held by Meyer, *Die Luftschiffahrt in Kriegerrechtlichen Beleuchtung*, p. 20; by Catellani, *Le Droit Aérien*, p. 188; and Rolland, *op. cit.*, p. 578.

<sup>3</sup> Cf. Kaufmann, *Annuaire de l'Institut*, Vol. 24, p. 139; Belleyer, *ibid.*, p. 104; Lemoyne, *ibid.*, p. 226; Merignhac, *Traité*, Vol. I, p. 544, and Spaight, p. 66.

<sup>4</sup> M. Beernaert of the Netherlands at the interparliamentary conference at Geneva the following year likewise advocated the prohibition wholly or in part of aerial warfare. *Rev. de Droit Int. et de Lég. Comp.*, Vol. 14, p. 569.

In general, they argued that it was difficult if not impossible to employ air ships for purposes of attack without exposing the lives of unoffending non-combatants and private property to destruction; that it was impossible to direct their operations solely against the armed forces or military works of the enemy; that the sentiment of the civilized world had condemned it, as shown by the action of both Hague conferences in forbidding the launching of projectiles and explosives from balloons, and that its general use as an instrument of combat would accentuate rivalry among States and increase the national burdens of building aerial fleets.

New inventions, said von Bar, must be viewed from two points: (1) from the stand-point of their efficacy, and (2) from the stand-point of their humanity and especially with regard to their effect upon non-combatants. If their effectiveness was not very considerable, while the result would be to inflict great injury on those who were not taking active part in military operations, they should not be employed for purposes of combat. Air ships belonged to this class of instruments. They could not carry heavy guns or considerable quantities of ammunition, and their projectiles and bombs could not be launched with precision against legitimate objects of attack. Innocent civilians, therefore, would more often be the victims of their attacks than combatants would be; consequently, their employment for the purpose of destruction should be renounced and their use restricted to exploration and other non-destructive purposes.<sup>1</sup> Professor Holland expressed a similar view and even went to the length of expressing regret that the progress of science had made possible aerial navigation; however, he had little hope that the launching of projectiles from air craft would be prohibited, but he did not wish to abandon all hope.<sup>2</sup> Alberic Rolin opposed the use of air ships as agencies of combat, except for defence against attack by enemy air craft, first, because it would lead to a tremendous rivalry between States and a consequent augmentation of their military burdens, and second, because they could not be employed without violating the rights of non-combatants and without outraging the established

<sup>1</sup> *Annuaire*, Vol. 24 (1911), pp. 127-130. See the text of von Bar's proposed code in Spaight, *Air Craft in War*, p. 143.

<sup>2</sup> Letter to M. Fauchille, February 5, 1911, *ibid.*, p. 137.



principles of humanity.<sup>1</sup> Westlake,<sup>2</sup> Fiore,<sup>3</sup> Labra, Malaquer, and Strisower expressed similar views and argued that air craft should be employed only for purposes of observation and communication. Lapradelle was willing to recognize the legitimacy of aerial war only if it was established that it could be carried on without exposing the peaceful population to greater danger than they were exposed to through land or naval bombardment.<sup>4</sup> He pointed out, as others had done, that aeroplanes were incapable of confining their bomb-dropping to legitimate objects of attack.

On the other hand, the legitimacy of aerial warfare found advocates in MM. Fauchille, Kaufmann, Meili, Renault, Edouard Rolin, and Edouard Clunet. In general, they argued that it had not been demonstrated that it was impossible to employ aerial craft without inflicting serious injury upon the peaceful population; that its interdiction would not result in the diminution of military burdens; that as no one proposed to prohibit air ships from defending themselves against attack by enemy air craft, fighting would therefore necessarily take place in the air, and the civil population would be exposed to danger from falling projectiles and even from air ships themselves; that as instruments of destruction they were no more objectionable than mines, submarines, torpedoes, and other engines of warfare the legitimacy of which was generally recognized; that if their use were allowed for purposes of observation and communication, the right of the opposing belligerent to fire upon them with his land batteries would have to be recognized, in which case the peaceful population would be exposed to danger from such operations, and finally, it was pointed out that many States had refused to join in the condemnation against the launching of projectiles and explosives from balloons, pronounced by the Second Hague Conference.<sup>5</sup>

The arguments of the supporters of aerial warfare prevailed. The Institute accordingly rejected a motion by Holland prohibiting the employment of air craft for any and all purposes,

<sup>1</sup> *Ibid.*, pp. 148 ff., 340.    <sup>2</sup> *Ibid.*, p. 150.    <sup>3</sup> *Ibid.*, p. 338.

<sup>4</sup> *Ibid.*, p. 339.

<sup>5</sup> Cf. especially Fauchille's summary of the arguments, *ibid.*, p. 55. Cf. also pp. 53, 341; also his article *Le Bombardement Aérien* in the *Rev. Gén. de Droit Int. Pub.*, Vol. 24 (1917), especially pp. 66-67.



including even observation, exploration, and communication.<sup>1</sup> It also rejected a proposal advocated by Westlake, Alberic Rolin, and Fiore prohibiting their employment except for the last-mentioned purpose.<sup>2</sup> The rule finally adopted by the Institute recognized the legitimacy of aerial warfare only upon the condition that it did not expose the persons and property of the peaceful population to greater danger than that to which they were exposed through the established methods of land and naval warfare.<sup>3</sup>

Spaight, who has given much consideration to the subject, reaches the conclusion that however much jurists may argue against the use of air craft in war, its prohibition "appears nothing more nor less than a beautiful dream."

"Can anyone," he asks, "having in view the mine, the torpedo, the shrapnel shell, or remembering what happened at the great redoubt of Borodino, the bloody angle at Cold Harbor, or 203 Metre Hill at Port Arthur . . . condemn air craft on the score of inhumanity as compared with existing engines of war? And even if their employment for destructive work is forbidden, what practical possibility is there of restricting them solely to scouting and reconnaissance purposes?"

It is submitted, however, that this proposition is based on a confusion of the character of the instrument with its mode of employment. It will readily be admitted that the dropping of bombs from air ships is no more cruel or inhumane than the use of the other weapons mentioned above but the difference lies in the fact that it is possible to confine the effect of the latter agencies of destruction to the combatant forces and legitimate material objects of attack — and they were in fact so employed in the instances mentioned by Spaight — whereas experience has abundantly demonstrated that the air ship cannot in many cases be effectively used for purposes of bombardment without exposing innocent non-combatants and private property to the danger of unlawful destruction. As in the case of the submarine, it is not the legitimate use of the instrument that is objectionable, but its use when the effect is to violate those rules which international convention and usage have sanctioned in the interest of humanity and for the protection of peaceful

<sup>1</sup> By a vote of seventeen to five.      <sup>2</sup> By a vote of fifteen to nine.

<sup>3</sup> Clunet (*Jour. de Dr. Int.*, 43: 386) says the rule was declaratory of the existing customary law, but as Rolland remarks (*op. cit.*, p. 505, n. 7), there was no custom regulating the matter in 1911, because there had been no practice.

non-combatants. In any case, air ships should be restricted to attacks within the military zone and should be forbidden to make attacks upon towns and villages far behind the lines.

§ 309. **The German Justification.** Nevertheless, the Germans sought to justify their bombardment of various open towns in Belgium, France, Servia, and Russia on the ground that they were occupied by enemy troops or were the seat of railways which were used by the civil population, and no serious effort appears to have been made to distinguish between the persons and objects of legitimate attack and those which were not. Technically, this may not have been contrary to the letter of the Hague convention, but it was manifestly at variance with the long-recognized immunities of non-combatants and of private property, to say nothing of the principles of humanity.

The German *communiqués* regarding their zeppelin raids usually stated that bombs had been dropped on "places of military importance," the "fortress of London," the "fortified place of Great Yarmouth," and the like; but the fact is the larger number of towns which they attacked were not fortified or defended against aerial attack, nor did they contain establishments of military importance, and when they did, the bombs dropped rarely fell upon them.

Finally, the Germans attempted to justify certain of their aerial attacks as a measure of retaliation against Great Britain and France for having bombarded towns in Belgium, France, Russia, and Servia which were occupied by German military forces. This, however, was not a justifiable excuse, first, because the towns in question were occupied by the troops of the enemy, and second, because they belonged to the bombarding belligerent, and if non-combatants were injured or private property destroyed, the loss fell upon Belgium or France, as the case might be, and not Germany. In other words, the Germans assimilated unoccupied and undefended towns in the enemy country to the status of those occupied by their own military forces.

§ 310. **The German Practice Criticised.** It is one thing to attack a town occupied by the military forces of the enemy; it is a wholly different thing for an aviator to fly far behind the lines of the enemy and drop bombs upon towns inhabited by peaceful civilians, in which 'not a soldier, a piece of artillery, or

an establishment of military importance is to be found. Many of the towns "raided" by German Zeppelins in England, France, and probably elsewhere, as well as a goodly number of those upon which bombs were dropped in Italy by Austrian aviators, were undoubtedly "open," "undefended," and "unfortified." In many of them not a soldier or a battery was to be found, nor were there any munitions factories, depots, or military establishments or works of any kind whatsoever within their limits. The inhabitants were peaceful non-combatants and consisted for the most part of old men, women, and children who had been left behind after all men fit for military service had been drafted into the army.<sup>1</sup>

Such attacks as those on the Zeppelin sheds at Friedrichshafen, on the submarine bases at Zeebrugge, and on the railroad stations at Ostend and Metz were lawful acts of bombardment, but the bombardment of hospitals, churches, and private houses cannot be defended.<sup>2</sup>

§ 311. **Aerial Attacks as Acts of Reprisal.** During the first year of the war British and French aviators claim to have confined their attacks to fortified or defended towns within the enemy's lines, i.e., within Belgian or French territory occupied by the German forces or to similar places in Germany. In consequence, however, of repeated and indiscriminate attacks by German aviators upon undefended towns, villages, and even hospitals in France and England, resulting in the killing of large numbers of non-combatants, including women and children, British and French aviators were directed in 1916 to carry out reprisal measures against certain German towns which until then had been spared from attack. In pursuance of this measure, Stuttgart, Karlsruhe, and Freiburg in Baden were bombed in the summer and autumn of 1916. The royal palace at Karlsruhe and the palace at Stuttgart were both damaged, and a goodly number of civilians are said to have been killed. These attacks provoked strong indignation throughout Germany, but the

<sup>1</sup> "Germany cannot be reproached," says Müller-Meiningen (*Zusammenbruch des Völkerrechts*, Eng. trans., *Who are the Huns?* pp. 254-255), "for killing women and children because an airman cannot compute the exact spot on which he intends his missile to strike. It is in accord with the tragic consequences of war that here too the innocent must suffer with the guilty."

<sup>2</sup> Compare Picciotto, "Some Notes on Air-warfare" in the *Jour. of the Soc. of Comp. Leg.* July, 1915, pp. 150 ff.

Entente governments replied that those places were as much fortified as were Hartlepool, Scarborough, Whitby, and other English coast towns which had been attacked and bombarded by German cruisers, to say nothing of numerous other towns and villages in England and France upon which bombs had been dropped by German aviators. Whether the German towns were "open" and "undefended" or not, the Germans could not consistently complain of the Anglo-French attacks when they themselves were carrying out operations almost daily against enemy towns and villages which by no process of reasoning could be regarded as "defended."<sup>1</sup> On their part they also claimed that they had bombarded only fortified places and places *situated in the zone of operations in direct relations with the enemy*, a category which they construed to embrace all places in England and elsewhere which came within the range of their air craft.

The increasing frequency of German aerial raids over England in 1915 gave rise to a more or less wide-spread demand for measures of reprisal against Germany. Various public meetings were held throughout England at which resolutions were adopted urging the government to adopt a policy of retaliation, and a considerable number of influential newspapers, such as the *Chronicle*, the *Saturday Review*, the *Telegraph*, the *Star*, the *Westminster Gazette*, and the *Graphic* joined in the demand.<sup>2</sup> But it was highly creditable to the English sense of

<sup>1</sup> Carlsruhe is said to have been occupied by a garrison of 4000 men and had a factory for the manufacture of arms besides a railway station. Freiburg, although not a fortified town, contained barracks and a munition factory and was the seat of large chemical works. It was, therefore, a place of strategic importance. Cf. the observations of Prof. W. H. Hulme in the *New York Times* of April 26, 1917.

<sup>2</sup> Sir Arthur Conan Doyle, in a letter to the *Times* of October 14, 1915, urged a resort to reprisals. "If," he said, "a small avenging squadron of swift British aeroplanes were stationed in eastern France, and if it were announced by the government that every raid upon an open town in Great Britain would automatically and remorselessly cause three similar raids on German towns, we should soon bring them to reason. I can well imagine that our airmen would find such work repugnant, but they must bear in mind that women and children have for a long time been sacrificed over here, that all forbearance has been shown, and that no other methods but those of reprisal offer any assurance that we can save civilians from these murderous outrages." Cf. also his letter in the *Times* of May 27, 1918. Lord Beresford in the House of Commons on February 10, 1916, urged the government to treat German aviators who attacked undefended places as pirates and hang them in public for the murder of women and children.

justice and humanity that the general opinion of the country was opposed to such a policy, and with the few exceptions mentioned, reprisals were not resorted to during the early part of the war.<sup>1</sup> But as time passed the German attacks became more frequent and the toll of innocent lives heavier. In the spring of 1917 there was a recrudescence of the popular agitation in favor of resort to a general policy of reprisals against Germany, and the demand became so widespread that the government could no longer ignore it. On June 26 a debate on the question occurred in the House of Lords during the course of which Lord Strachie opposed such a policy, saying that in after years the people of Great Britain would be thankful that they had not lowered themselves to the level of the Germans. The Earl of Derby expressed a similar view. The whole country, he said, would associate itself with the suggestion that Great Britain should not try to imitate German brutality. The Archbishop of Canterbury likewise vigorously protested against the policy of reprisals.

In the meantime (April 14, 1917) a large squadron of British and French aeroplanes again raided the town of Freiburg as an act of reprisal in consequence of the attacks of German submarines on British hospital ships in violation of the tenth Hague convention.

According to German accounts seven women, three men, and one soldier were killed and twenty-seven persons were injured.<sup>2</sup> Public opinion in England was, however, very much

<sup>1</sup> Among those who wrote letters to the press in opposition to the proposed retaliation were Viscount Bryce, Sir Edward Clarke, Lord Alverstone the Lord Chancellor, Professor Pollard, and Professor Dicey. Great Britain, said Lord Bryce, had stood from the first for respecting the Hague conventions and the rights of non-combatants. "To imitate the policy of savagery carried out by the German government in Belgium and France and by the Turkish government in Armenia," he declared, "would be to lower ourselves to the level of those governments." Cf. also the *Solicitors' Journal and Weekly Reporter* of February 19, 1915, p. 296, and of October 23, 1915, p. 15, and September 16, 1916, p. 738. Professor Pollard pointed out that the British government had attempted to differentiate between the commanders and crews of submarines on the one hand and other prisoners, but had been compelled to abandon the policy to avoid a reversion to barbarism. For the same reason the resort to reprisals against Germany for the conduct of her aviators would not be just or expedient. Lord Alverstone opposed it on the ground that it would only make England "a party to a line of conduct condemned by right thinking men of every civilized nation." Sir Edward Grey in the House of Commons on October 28, 1915, also expressed himself as being opposed to the policy of reprisals.

<sup>2</sup> London weekly *Times*, April 25, 1917.

divided on the question of the advisability of the attack on Freiburg. In the House of Lords, where the matter was discussed at some length, the act was condemned by Lords Buckmaster, Selbourne, Loreburn, and Parmoor and by the Archbishop of Canterbury, but it was defended by Lords Curzon and Milner, the two members of the war cabinet who were responsible for it.<sup>1</sup> Lord Curzon in defending the act stated that it had been carried out after consultation with the French government and with its approval, but he also added that no further reprisals would be undertaken, provided the Germans ceased their attacks on British hospital ships.

As the German raids upon undefended English and French towns multiplied, the popular demand in both countries for retaliation continued to increase, and on September 30 French aviators, apparently by direction of their government, dropped a large quantity of projectiles on the city of Stuttgart as a reprisal for the German bombardment of the open town of Bar-le-Duc. On the same day other raids were made on German "military bases and railway stations in various German towns occupied by German military forces." On the following day Frankfort-on-the-Main,<sup>2</sup> Stuttgart, Treves,<sup>3</sup> and Coblenz were bombarded as a measure of reprisal. More than fifteen thousand pounds of bombs were reported to have been dropped on German military establishments in Belgium and behind the German front in France. Railway stations, air dromes, encampments, and munitions depots in other places were similarly bombarded.<sup>4</sup> During the same week Entente airmen dropped bombs on various other German towns which, according to the German version, were open and undefended, among them Flurbach, Rustatt, and Baden-Baden.

In October, 1917, French aviators bombarded the German town of Mülheim, the aviation grounds at Behlestadt, munitions depots at Ruffach, the railway station at Thionville, and the town of Offenburg in Baden as a reprisal for the German bombardment of Dunkirk, and in the same month Belgian aviators

<sup>1</sup> *New York Times*, May 4, 1917.

<sup>2</sup> Already on August 12 French aviators had dropped bombs on Frankfort in retaliation for the German aerial bombardment of Nancy.

<sup>3</sup> Treves had been bombarded in May by French airmen in retaliation for the German bombardment of Châlons and Epernay.

<sup>4</sup> *New York Times*, October 3, 1917.



attacked a number of towns behind the German lines as a reprisal for German bomb-dropping behind the fighting lines.

About the same time it was announced in London, that the cabinet had practically decided on a general policy of reprisal, but no such policy appears to have been officially announced. Nevertheless, by December 1, 1917, bombardments of German towns as a reprisal for particular acts of the Germans had become so frequent that in fact the general policy of air-raid reprisals appears to have been definitely adopted.<sup>1</sup> The British government, however, was very reluctant to adopt the German practice of indiscriminate bombardment of open and undefended towns far behind the military lines, and a large section of English public opinion continued to oppose any policy which had the appearance of competition with Germany in her barbarous methods of aerial warfare. Great Britain and France, in fact, did not resort to the policy of reprisals until they were fairly driven to it by repeated acts of the Germans so flagrant in character as to sorely try the national patience.<sup>2</sup>

Although the Germans appear never to have had any scruples against such methods of warfare and resorted to them in fact almost from the first day of the war, they vigorously denied the right of the enemy to have recourse to similar measures by way of reprisal. In August, 1918, the Emperor in a telegram to the burgomaster of Frankfort, upon which a British reprisal raid had recently been carried out, expressed his "deep sympathy in the misfortune that has befallen the open city of Frankfort through the enemy's aerial attack, which is *contrary to international law*, and which has resulted in numerous victims."<sup>3</sup> German bombardment of London, Paris, Nancy, Amiens, Hartle-

<sup>1</sup> According to a London despatch of May 22, 1918, more than fifty attacks had been made by British and French aviators upon various places in Germany since December 1, 1917, when the general policy of reprisals is understood to have been entered upon.

<sup>2</sup> In March, 1918, a debate took place in the French Chamber of Deputies on the question of aerial reprisals, and it resulted in the same division of opinion as in England. Throughout the country also there was considerable opposition to reprisal measures, mainly for humanitarian reasons and because the French considered such methods of warfare to be contrary to the laws of civilized warfare. From the first the French government frowned upon the idea of reprisals, although from first to last more than forty-five German air raids were made upon Paris. Cf. a Paris despatch in the *New York Times* of July 1, 1918.

<sup>3</sup> *New York Times*, August 19, 1918.



pool, Scarborough, Whitby, and numerous other cities and towns in England, France, and Belgium had never been regarded as "contrary to international law," but when the enemy retaliated in kind, the Emperor saw in such acts a violation of the law of nations.

With a view to deterring the allies from carrying out a policy of reprisal against Germany the German authorities adopted the expedient (February, 1918) of placing large numbers of British and French prisoners in Stuttgart, Karlsruhe, and other towns in southwestern Germany which were exposed to enemy aerial raids, and notice to this effect was served upon the British and French governments.<sup>1</sup> This expedient, however, was quite ineffective, and the attacks upon German towns proceeded apace and increased in number and with telling effect. As the results began to be seriously felt in Germany, the German population in the towns and cities most immediately exposed urged the German authorities to come to an agreement with the Entente governments for the reciprocal abandonment of the practice of bombarding towns outside the zone of military operations, since "it served no military purpose."<sup>2</sup>

The allied policy of reprisals having once been entered upon, the Germans resorted to counter-reprisals, and their last raids upon Paris in July, 1918, were defended as a "reprisal for the continued bombing of German towns." The "continued bombings of German towns" were themselves acts of reprisal for persistent and long-continued raids upon English and French towns, which had begun in the early months of the war.

There was and is still a wide difference of opinion regarding the expediency and morality of resorting to reprisals, especially where the military interests subserved are slight, and where it results in the killing of innocent non-combatants. Most writers on international law deprecate recourse to such a measure and urge that it should be resorted to with reserve, without the spirit of vengeance, and only for the purpose of

<sup>1</sup> New York *Times* of February 12, 1918, quoting from the *Kölnische Zeitung* of January 7.

<sup>2</sup> Geneva press despatch of July 12, 1918. In October, 1918, eleven cities situated on the Rhine are reported to have appealed to German headquarters to come to an agreement with the enemy for the reciprocal abandonment of aerial attacks upon open towns.

preventing a repetition by the enemy of the acts against which it is directed.<sup>1</sup>

Those who defend the policy of reprisals argue that it is the only effective means of compelling an unscrupulous enemy to observe the rules of warfare. Instances of retaliation may be found in abundance in the history of every great war, and the right to resort to it is fully sanctioned by practice. It is, however, a measure of doubtful expediency, since it often tends to multiply rather than diminish wrongs and to cause the war to degenerate into barbarism. The results often injure the innocent rather than the guilty, and this is especially true of aerial reprisals against open towns.

§ 312. **Treatment of Captured Aviators.** Aviators when captured by the enemy are of course entitled to be treated as prisoners of war like other lawful combatants who fall into the hands of the opposing belligerents, and no one could be found today who would approve the extraordinary position taken by Bismarck in 1870 that aeronauts engaged in transporting despatches may be treated as spies.<sup>2</sup> Nevertheless, two British

<sup>1</sup> Holland thus states the conditions under which reprisals may be resorted to: "The offence in question must have been carefully inquired into; redress for the wrong or punishment of the real offender must be unattainable; the reprisals must be authorized, unless under very special circumstances, by the Commander in Chief and they must not be disproportionate to the offence and must in no case be of a barbarous character." Substantially the same limitations are imposed by the *American Rules of Land Warfare* of 1914 (art. 381): "Retaliation will never be resorted to as a measure of mere revenge but only as a means of protective retribution, and moreover, cautiously and unavoidably, that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence and the character of the misdeeds that may demand retribution." They also add (art. 379) that reprisals may be resorted to only for the purpose "of enforcing future compliance with the recognized rules of civilized warfare."

The Institute of International Law at its Oxford meeting adopted the following rule: "In the grave cases in which reprisals appear to be an imperious necessity the manner of inflicting them, and their extent, must not be disproportioned to the infraction committed by the enemy," and it added: "They must in all cases take account of the laws of humanity and morality" (arts. 85-86 of the manual of the laws of war, *Annuaire*, Vol. V, p. 174). The Hague conventions are silent on the subject of reprisals. Fauchille thinks it was not due to any desire to forbid reprisals, but because an agreement as to the conditions under which they might be resorted to was impossible. *Rev. de Droit Int. Pub.*, 73: 24.

<sup>2</sup> Nevertheless Geffcken (ed. of Heffter, § 250, n. 1) holds that an aviator who maintains communications between different parts of an army may be regarded as a spy; but Bluntschli (*Droit Int. Cod.*, § 632, bis) justly maintained that an aviator despatch-bearer could not be regarded as an offender against the laws of war. Bismarck's theory was emphatically condemned by the Brussels Congress

aviators who fell into the hands of the Germans were sentenced in February, 1918, to ten years penal servitude for having dropped "hostile proclamations within the German lines."<sup>1</sup> The British government upon learning of the sentences caused the German government to be informed not only that such a punishment was without any justification in international law, but that it had a mass of evidence of similar activities on the part of German airmen, and that if the officers in question were not set at liberty, measures of reprisal would be taken against German officers in British hands. Thereupon they were released.<sup>2</sup>

In September, 1918, copies of orders were found on German prisoners taken by the French, showing that the Austrian government had given instructions that the death penalty should be inflicted on captured aviators known to have distributed proclamations within the enemy's lines. The French government thereupon caused the Austro-Hungarian government to be informed that in case any French aviators were punished with death for such an act, the French authorities would retaliate by inflicting the same penalty in double proportion upon Austrian officers held as prisoners by the French.<sup>3</sup>

Neither the German nor the Austrian threats appear to have ever been carried out. There was at first considerable demand in both England and France that captured German aviators who had been guilty of dropping bombs upon undefended towns should be denied the treatment reserved for prisoners of war taken while engaged in lawful belligerent operations. It will be recalled that the British government undertook to differentiate between the treatment of German submarine prisoners and

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and by both Hague Conferences. The subject is considered by Rolland, article cited, pp. 529-530.

<sup>1</sup> The "hostile proclamations" referred to were copies of President Wilson's declaration of peace terms. *New York Times*, February 3, 1918. German aviators themselves frequently dropped propaganda literature within the allied lines. The *Norddeutsche Zeitung* of October 7, 1915, stated that quantities of the "holy war" proclaimed against England and France by the Mohammedan Padishah had been dropped by German aviators among Indian troops in the French lines. The United States *Official Bulletin* of April 2, 1918, published the text of a "lying manifesto" against England and her allies, many copies of which were dropped by German or Austrian aviators within the Italian lines in February, 1918.

<sup>2</sup> London weekly *Times*, March 15, 1918.

<sup>3</sup> Paris despatch in the *New York Times*, October 6, 1918.

other prisoners, but the threat of the German government to retaliate against British prisoners caused the British government to abandon its policy. Doubtless for the same reason it was regarded as inexpedient to resort to differential treatment in respect to captured aviators, great as the provocation was.

The question as to the treatment of air craft and their crews who were forced to land in neutral territory was raised many times during the war. Again and again German aeroplanes landed on Dutch territory, sometimes in consequence of their having been brought down by fire from Dutch anti-air craft guns,<sup>1</sup> sometimes in consequence of disabled machinery, and sometimes for lack of gasoline. In all such cases the aviators were interned by order of the Dutch government, and their *appareil* was seized and detained until the end of the war.

<sup>1</sup> Cf. the case of the L-19 referred to above. Other cases are mentioned by Rolland, *op. cit.*, p. 582, n. 5. Two cases are referred to in the *New York Times* of August 8 and August 15, 1917. The German government, it will be recalled, complained at the action of the Dutch authorities in firing upon and bringing down a "shipwrecked" aviator who was seeking a landing place in Dutch territory. In one case the Danish authorities seized the *appareil* of a wrecked German aeroplane which descended upon Danish territory and interned the aviator, but the Norwegian authorities in a similar case treated the aviator as a *naufragé* and released him. In several cases British sea planes which had been wrecked on the high seas were salvaged and brought into Dutch ports by Dutch merchantmen. The officers and crews thus rescued were released and sent home. This treatment, the Dutch government contended, was an exception to the general rule in respect to the duty of a neutral to intern members of belligerent forces entering neutral territory, and was based upon considerations of humanity. The Dutch government, however, refused to restore the sea planes and other war material salvaged, a fact which led to some controversy between the British and Dutch governments.

## CHAPTER XX

### VIOLETIONS OF THE GENEVA CONVENTION

§ 313. Purpose of the Geneva Convention; § 314. Charges as to German Violations of the Convention in Belgium; § 315. French Charges against the Germans; § 316. Bombing of Hospitals; § 317. German and Austrian Charges; § 318. The Charges Analyzed; § 319. Sinking of Hospital Ships — the *Amiral Gauteaume*; § 320. Cases of the *Asturias*, *Anglia*, *Portugal*, *Britannic*, *Uperide* and *Bremer Castle*; § 321. The German Charge Respecting the Misuse of British Hospital Ships; § 322. The British Reply; § 323. Sinking of the *Asturias Gloucester Castle*, *Lanfranc*, *Donegal* and *Dover Castle*; § 324. Protest of the International Red Cross Committee; § 325. British and French Counter-measures; § 326. Sinkings in 1918: The *Rewa*, the *Stewart Castle*, the *Llandovery Castle* and the *Warilda*; § 327. Charges against the Entente Powers: Cases of the *Elektra*, the *Ophelia* and the *Paklat*; § 328. Torpedoing of Ships Engaged on Philanthropic Missions; § 329. German Excuses; § 330. Conclusion.

§ 313. Purpose of the Geneva Convention. Like most of the other international conventions which deal with the conduct of war, the Geneva convention and the Hague convention for the adaptation of the principles of the Geneva convention to maritime warfare were systematically violated, Germany, as in other cases, being the most frequent offender. The purpose of the Geneva convention, as is well known, was to confer an immunity, so far as possible, upon the persons engaged in the humanitarian work of caring for sick and wounded soldiers, upon the places where they are collected, and upon the instrumentalities employed in ministering to their needs.

The purpose of the Hague convention for the adaptation of the principles of the Geneva convention to maritime warfare was to confer a similar immunity on hospital ships and their staffs as well as upon ships engaged in the transportation of the wounded.<sup>1</sup>

<sup>1</sup> The Geneva Convention of 1864 was ratified by all the belligerents in the recent war. All of them, except Bulgaria, Greece, Montenegro, and Servia, appear also to have ratified the convention of 1906. Cf. Higgins, *The Hague Peace Conferences*, p. 35. There being no "general participation" clause in the convention, it was, therefore, binding on all the belligerents whose governments had ratified it. The Geneva convention of 1864 remained in force as between the powers which had not ratified the convention of 1906. All the belligerents in the recent war had also ratified the Hague convention of 1899 for the adaptation to

§ 314. **Charges as to German Violations of the Convention in Belgium.** Against the Germans it was charged that they were guilty of systematically firing upon hospitals, ambulances, stretcher bearers, and dressing stations. During the early operations in Flanders it is alleged that it was practically impossible to remove the wounded from the battle field except under cover of night, and even then only with the greatest danger, owing to the persistent firing by the Germans on the stretcher bearers while crossing the field.<sup>1</sup> The reports of the Belgian official commission of inquiry also charge the Germans with frequently using the Red Cross or white flags for approaching the enemy with a view to attack, with firing upon ambulances, with maltreating ambulance drivers, and with killing the wounded.<sup>2</sup>

The Bryce commission in its report confirms the charges of the Belgian commission. It contains a large number of depositions of soldiers and Red Cross workers charging the Germans with firing upon hospitals, stretcher bearers, and ambulances; with using the Red Cross flag for purposes of approach; with hoisting it over motor cars armed with machine guns; with transporting munitions in ambulances, with maltreating the wounded, and the like.<sup>3</sup>

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maritime war of the principles of the Geneva convention, but seventeen powers, it appears, had not ratified the corresponding convention of 1907, and among these were seven belligerents in the recent war: Bulgaria, Great Britain, Greece, Italy, Montenegro, Serbia, and Turkey. But in accordance with article 25 of the latter convention, the convention of 1899 (of which the convention of 1907 was merely a revision) remained in force as between the powers which had ratified it, but which did not ratify the convention of 1907. It was, therefore, binding on all the belligerents in the recent war.

<sup>1</sup> These charges were frequently made by British and French officers and by neutral newspaper correspondents. Cf. an article by Alexander Powell entitled "On the Firing Line" in *Scribner's Magazine*, October, 1915, pp. 464-465. Mr. Powell, describing the methods of caring for the wounded on the battle fields of Belgium and France, says: "In the flat country of Artois and Flanders it is out of the question to remove the wounded except under the screen of darkness, and even then it is an extremely hazardous proceeding, as the German gunners do their best to drop shells upon the stretcher bearers."

<sup>2</sup> Cf. especially reports on Violations of the Rights of Nations, etc., p. 10 and pp. 48 ff. Sir Gilbert Parker in his *The World in the Crucible*, pp. 349 ff., details some of the charges against the Germans in Belgium. Cf. also Nothomb, *Les Barbares en Belgique*, pp. 22 ff.; Saint Yves, *Les Responsabilités de l'Allemagne*, pp. 423 ff., and Toynbee, *The German Terror in Belgium*, p. 60.

<sup>3</sup> Cf. especially pp. 56 ff., 187 ff., and 202 ff.; also Morgan, *German Atrocities*, pp. 64 and 73. The latter author publishes facsimile extracts from diaries of German soldiers in which they record their own experiences and observations.



§ 315. **French Charges against the Germans.** The French official commission of inquiry makes similar charges against the Germans.<sup>1</sup> In December, 1914, the French government issued a formal protest through the Spanish embassy at Berlin against the German violations of the Geneva convention, which France, it was said, had scrupulously observed.<sup>2</sup> The protest alleged various instances in which the Germans had refused to return Red Cross physicians, sanitary officers, and members of hospital staffs in accordance with the rules of the convention; charged them with having despoiled the Red Cross personnel of its equipment; with maltreating hospital officers and attendants, etc. Germany was accordingly notified that unless assurances were given that in the future the terms of the convention were observed by her forces, France would be driven to adopt retaliatory measures.<sup>3</sup> Charges were also made against the German forces in the Cameroons of "repeatedly and continuously" firing upon stretcher bearers at Bango in November, 1915.<sup>4</sup> A report issued by the Russian commission of inquiry charged the Germans with torturing and even burning Russian prisoners and wounded.<sup>5</sup> The Servian government likewise

<sup>1</sup> Their report devotes considerable space to allegations in respect to the inhumanity of the Germans to their prisoners of war, which, it says, was proven by the evidence of the victims. The report concludes with three columns of evidence relating to the bombing of ambulances by the Germans, the firing upon stretcher bearers, and the taking of surgeons as prisoners. Cf. also *Rapports et Procès-Verbaux d'Enquête de la Commission Instituée en Vue de Constater les Actes Commis par l'Ennemi en Violation du Droit des Gens.*, Docs. Relative à la Guerre (Paris, 1916), Vols. III-IV, pp. 23 ff., and 137 ff., and the documentary evidence in *Les Violations des Lois de la Guerre par l'Allemagne, Publication Faite par les Soins du Ministère des Affaires Étrangères* (Paris, 1915), ch. V. English translations of the more important of these documents may be found in Bland, *Violations of the Laws of War, 1914-1915*, ch. V. Cf. also Lavissee and Andler, *German Theory and Practice of War*, pp. 33 ff.; Saint Yves, *op. cit.*, pp. 423 ff., and Maccas, *German Barbarism*, pp. 86 ff.

<sup>2</sup> On September 18 the French minister of war issued a *communiqué* in which, referring to the obligation resting upon France to give effect to the Geneva convention, he admonished the French medical personnel to treat with the greatest consideration German wounded and threatened to deal severely with those who did not conform to the requirements of the convention. Text in *Rev. Gén. de Droit Int.*, 1915, Docs., p. 80.

<sup>3</sup> *Ibid.*, p. 95.

<sup>4</sup> Cf. a despatch of Captain Bissell to the governor-general of Nigeria, December 18, 1915, in a British parliamentary paper *Relating to German Atrocities and Breaches of International Law in Africa* (1916), Cd. 8306, p. 17.

<sup>5</sup> An English translation of this report was circulated extensively in America. Cf. also various depositions by Russian soldiers in Morgan's *German Atrocities*, pp. 151 ff.; also the *New York Times* of July 7 and September 23, 1916.



charged the soldiers of Austria-Hungary with committing numerous atrocities upon its prisoners and wounded.<sup>1</sup>

§ 316. **Bombing of Hospitals.** Many charges were also made against German aviators for deliberately bombing hospitals in France and Belgium. One of the most flagrant instances of the kind occurred on the night of August 19, 1917, when an attack was made by German aviators on a hospital at Vadelaincourt near Verdun. Twenty nurses and ten wounded soldiers were killed and forty-nine wounded.<sup>2</sup> Two previous attacks had already been made on the hospital in one of which a doctor and two nurses were wounded. On September 5 it was again bombarded for six and one-half hours during the course of which nineteen persons were killed and twenty-six wounded.<sup>3</sup> About the same time an aerial attack was made on a group of British-American hospitals in a village on the coast of France, occupied by the St. Louis and Harvard units, during the course of which an officer of the medical staff was killed. Sixteen other persons, ten of whom were hospital patients, were wounded.<sup>4</sup>

Attacks were also made on hospitals at Bar-le-Duc, Dugny Monthairons, and Belrupt, in each of which a number of persons were killed and wounded. Various other instances were reported in the press despatches.<sup>5</sup> Belgian hospitals were also the victims of German aerial bombardment, and the Belgian government

<sup>1</sup> The charges are detailed by Professor Reiss of the University of Lausanne in his brochure *How Austria-Hungary Waged War in Serbia*, especially pp. 13 ff.

<sup>2</sup> G. H. Perris, *New York Times*, August 24, 1917. Cf. also *New York Times*, September 8 and 44 *Clunet*, p. 1729. The *London Times* states that twenty-two persons were killed and about sixty wounded. According to the press despatches the aviator who dropped most of the bombs flew around the hospital at a low altitude for half an hour and, after dropping his bombs, fired upon the inmates and rescuers with his machine gun, even after the fire occasioned by the burning building had lit up the place so that he could hardly have mistaken its character. The hospital had been located at this place for more than two years and must have been known to German aviators. The Red Cross insignia, it is alleged, were plainly visible. The doctors were positive that the attack was deliberate, and that there could have been no mistake. One of the hospital buildings contained 180 wounded German prisoners. In one of the attacks nine wounded Germans were killed.

<sup>3</sup> *New York Times*, September 7, 1917, and *London weekly Times*, September 14, 1917.

<sup>4</sup> *New York Times*, September 8, and *London weekly Times*, September 14.

<sup>5</sup> See the account of Dr. George E. Brewer of the College of Physicians and Surgeons of New York City, then in charge of a hospital unit in France. *New York Times*, November 27, 1917. Cf. also a letter of K. Gaston, member of the Harvard medical unit in France, *New York Times*, November 10, 1917.

in November, 1917, addressed a protest to the powers against the wilful bombardment on the night of September 26-27 of Belgian hospitals at Calais, Petit Philippe, and the Gravelines Gateway.<sup>1</sup>

Complaint was made in England and France that the Germans conducted their aerial raids at night when it was difficult, if not impossible for them to see the Red Cross markings. It was even intimated that this policy was deliberately adopted by the Germans in order to enable them to allege mistake whenever hospitals were the victims of their attacks.

Throughout the year 1918 many cases were reported of the bombing of hospitals by the Germans in France. In the latter part of May a large group of British hospital tents and buildings situated far behind the lines, the character of which is said to have been well known to the Germans, were "raided" during the night by German aviators, and several hundred patients, nurses, and doctors were killed or wounded.<sup>2</sup> Similar raids followed during the ensuing nights.<sup>3</sup> The hospitals were clearly marked with the Red Cross emblems.

On June 10 Mr. MacPherson, undersecretary of state for war, stated in the House of Commons that during the preceding two weeks the Germans had bombed British hospitals in France seven times, and that these attacks had resulted in 991 casualties of which 338 were fatal.<sup>4</sup> Other attacks upon hospitals took place throughout the summer and autumn of 1918. On the night of June 24 a Canadian hospital located on a site behind the British front, which had been occupied as a hospital for eighteen months, was bombed by German aviators, and a number of doctors, nurses, and patients were killed. The roofs bore huge Red Cross signs, the buildings had never been used for military purposes, and their character was said to have been well known to German aviators who had flown over them many times during their daylight raids. One of the bombs went through two floors into the operating room where the surgeons

<sup>1</sup> Text in United States *Official Bulletin*, November 23, 1917. Hugh Gibson in his *Journal from Our Legation in Belgium* (p. 183) tells of the destruction by the Germans of a hospital near Mons. One man at least was burned alive in his bed. "It seems incredible," Gibson adds, "that Red Cross hospitals should be attacked. Instances come in from every side tending to show they are."

<sup>2</sup> New York *Times* of May 24, 1918, and London weekly *Times*, May 31, 1918.

<sup>3</sup> New York *Times*, May 31. <sup>4</sup> *Ibid.*, June 11, 1918.

were occupied with several urgent cases. They with the nurses were buried under an avalanche of débris, and in a few minutes the wing of the hospital was filled with roaring flames.<sup>1</sup>

On the night of July 15 bombs were dropped by German aviators on the American Red Cross hospital at Jouy. A number of enlisted men and several members of the hospital staff were killed and others were wounded. The hospital was full of wounded, and the doctors were operating at four tables. In order to remove an excuse which had several times been alleged by the Germans in justification of their attacks upon hospitals, this one had been located twenty miles behind the lines in an isolated château three kilometres from the nearest railway. Besides an enormous sign on the roof, it was marked with a cross 100 feet long and outlined on the lawn, which was plainly visible from an aeroplane several thousand feet high on the moonlit night during which the raid was made. Notwithstanding this fact two aviators flew back and forth several times over the hospital, and after descending to a level a few hundred feet above, they discharged their bombs directly upon the hospital.<sup>2</sup> During the same week several other American hospitals were attacked under similar circumstances and with similar results.<sup>3</sup> Austrian aviators were also charged with having bombed hospitals in Italy.<sup>4</sup>

§ 317. **German and Austrian Charges.** The German government in October, 1914, issued a report charging French troops and *francs-tireurs* with having violated "in a most flagrant manner" the Geneva convention.<sup>5</sup> They were charged with maltreating, robbing, mutilating, and even murdering German wounded; with attacking German motor cars while

<sup>1</sup> *Ibid.*, June 26, 1918.

<sup>2</sup> Report made at the request of the American Red Cross commissioner in France. Cf. the *New York Times* of July 17, July 18, and July 19, 1918.

<sup>3</sup> The details are given by the American newspaper correspondent Edwin L. James in the *New York Times* of July 19, 1918.

<sup>4</sup> In January, 1918, eighteen patients were killed by Austrian aviators in two Italian hospitals at Castelfranco and Veneto. *New York Times*, January 3, 1918. In February three hospitals in the suburbs of Venice are alleged to have been bombed. Considerable damage was done, and several ambulance workers who were engaged in rescuing the victims were killed, together with seven women and children. *London weekly Times*, February 1, 1918.

<sup>5</sup> This report was circulated in the United States in the form of a brochure entitled, *Violations of the Geneva Convention of July 6, 1906, by French Troops and Francs-Tireurs*.

transporting the wounded under the Red Cross flag; with firing upon German hospitals and robbing them of their staffs and equipment; with arresting and detaining members of the ambulance corps, and with committing various atrocities and breaches of the Geneva convention. These charges, however, were emphatically denied by both the British and French governments.

Charges were also made that a Red Cross ship containing Turkish wounded was attacked by a British submarine at San Stefano during the Dardanelles expedition; that British and French bombs were dropped on a dressing station at Ari-Burnum on July 4, 1915; that a Turkish hospital ship was bombarded by the British on the same day; that British and French motor ambulances were used for making reconnoissances; that troops were landed from English hospital ships at Sedil Bahr on July 3, 1915, etc.<sup>1</sup>

The Austrian government charged the Italians with having attempted to construct wire entanglements under the protection of the Red Cross flag, and the British or French were charged with having torpedoed an Austro-Hungarian hospital ship in March, 1916. The Italians were also accused of having shelled a Red Cross hospital at Gorizia on September 26, 1915, which at the time was flying a Red Cross flag which was plainly visible. Again, in August, 1918, the Austrian government charged that Italian aviators flew over Feltre and "attacked from low heights clearly recognized hospitals," killing a number of patients and other persons. The Italian government made similar charges against the Austrians, particularly in respect to the firing upon Red Cross buildings in the Plava Zone.

§ 318. **The Charges Analyzed.** It is impossible to verify the truth of all these charges and countercharges. It may be safely assumed that, like many other atrocity charges, some of them were exaggerated, while others were probably baseless. The Geneva convention does not undertake to guarantee an

<sup>1</sup> These and other charges are detailed by Muller-Meiningen in his *Der Weltkrieg und der Zusammenbruch des Völkerrechts* (Eng. trans.) *Who are the Huns?* pp. 87 ff.; in the *War Chronicle* of October, 1915, and in the *Norddeutsche Allgemeine Zeitung* of January 11, 1915. The German white book, *The Belgian People's War* (p. 7), alleged that Belgian civilians in various towns attacked German troops under cover of the Red Cross flag, and that they "did not shrink from attacking hospitals containing wounded soldiers."

absolute immunity of hospitals and of their staffs under all conditions. It merely imposes upon belligerents an obligation to respect them so far as the necessities of the military situation allows. Each commander must weigh, on the one hand, those necessities and, on the other hand, the imperative demands of suffering humanity and so far as possible spare the places in which the wounded are gathered and the persons who are engaged in caring for them.<sup>1</sup> Manifestly, it is not always possible during the course of an engagement to accord them the immunity which considerations of humanity dictate. Naturally, also, regrettable mistakes are inevitable, and hospitals are sometimes fired upon unintentionally. Their flags are not always visible, and not infrequently they are located near the lines and within the range of necessary military action. Belligerents are also under a strong temptation to employ the insignia of the Geneva convention for purposes for which it was not intended, and it may be assumed that sometimes the places over which it was hoisted or the persons bearing it were fired upon in the sincere belief that it was being improperly used, when in reality it was not. The charges, however, against the Germans in particular of persistently firing upon hospitals, ambulances, and stretcher bearers are so numerous and the evidence so abundant that it is impossible to believe that they showed the respect for the Geneva convention which they were bound to do.

The excuse generally alleged was mistake due to inability to see the Red Cross emblem or the impossibility of sparing certain hospitals, because they were situated close behind the lines. Neither excuse, however, was valid. Their raids were uniformly made at night, and if their aviators were unable to distinguish hospital markings, every consideration of humanity required them to refrain from bombing buildings whose character they were unable to verify in the darkness. In several of the cases referred to above the bombs were dropped from a level only a few hundred feet above the hospitals, leaving little doubt that the attack was deliberate and intentional. Both the Pope and the International Red Cross committee at Geneva protested against the conduct of the Germans and appealed to their government to spare hospitals and respect the lives of the sick and wounded as well as those engaged in ministering to

<sup>1</sup> Cf. Davis, *Elements of Int. Law*, p. 527.

their sufferings; but the appeals appear to have made little or no impression upon the German authorities or the military forces.

§ 319. *Sinking of Hospital Ships, the Amiral Gauteaume.* Whatever may be the facts as to the truth or falsity of many of the charges in respect to the violation of the Geneva convention, and whatever may be the merits of the German excuses alleged, there is one charge against the Germans the truth of which is beyond all question. It is the charge of sinking hospital ships and vessels engaged on missions of relief and philanthropy. The first flagrant offence of the kind was the torpedoing by a German submarine on October 26, 1914, of the French steamer *Amiral Gauteaume*, which had on board some twenty-five hundred Belgian refugees, men, women, and children, who were being transported from their stricken country to England. Fortunately, only about forty lives were lost, but it was no fault of the submarine commander that the loss was not greater, for the vessel was torpedoed without warning and without the destroyer even showing its colors. The deliberate sinking without warning of this peaceful merchant vessel while proceeding on a mission of mercy was an act entirely without military advantage and was not only contrary to the laws of humanity, but to the long-established customary law of nations, which undertakes to protect the lives of unoffending non-combatants, — contrary, indeed, to the provisions of the Hague convention and to those of the German prize code itself.<sup>1</sup>

The French government in a memorandum of January 29, 1915,<sup>2</sup> described the act as the "murder of inoffensive individuals," asserted that never before in the most barbarous times had a crime comparable to this been committed, and contrasted the conduct of the submarine commander who was responsible for it with the high and noble sentiments of humanity which Baron von Bieberstein at the Second Hague Conference had

<sup>1</sup> The immunity established by the Hague convention for the adaptation of the principles of the Geneva convention to maritime war applies only to hospital ships (art. 3); but the convention relative to certain restrictions with regard to the exercise of the right of capture in naval war (art. 4) exempts from capture (and of course from destruction) "vessels charged with religious, scientific or philanthropic missions," and this provision is embodied in the German prize code (art. 6).

<sup>2</sup> Text in the *Rev. Gén. de Droit Int. Pub.*, 1915, Docs., p. 112.



declared would always animate the naval commanders of Germany. Two days later the French minister of marine addressed to the powers a protest in the course of which he said: "The entire world will regard with horror this act as one unworthy of a civilized nation."<sup>1</sup>

§ 320. Cases of the *Asturias*, *Anglia*, *Portugal*, *Britannic*, *Uperiode*, and *Bremer Castle*. In the following month (February, 1915) an attempt was made by a German submarine to torpedo the British hospital ship *Asturias* off Havre, but happily without success. The British Red Cross society addressed a protest to the international committee of the Red Cross society at Geneva in which it declared that the vessel was painted and clearly marked in accordance with the requirements of the Hague convention, and that the ship had been duly notified to the German government in conformity with the provisions of the said convention.<sup>2</sup> The excuse alleged by the German government was the one so often put forward, namely, that the attack was due to "an unfortunate error."<sup>3</sup> In November the British hospital ship *Anglia*, while bound from France to England, was reported to have been sunk by a mine which, according to British accounts, had been planted by the Germans. The vessel had on board about three wounded soldiers with a staff of doctors, nurses, and attendants. About one hundred lives are reported to have been lost.

A particularly atrocious act of the kind was the torpedoing by a Turkish submarine on March 17, 1916, of the Russian hospital ship *Portugal*. The ship had on board 273 persons, mostly wounded, of whom 115 were drowned. Among the latter were a considerable number of Red Cross officials, doctors, and nurses. The Russian government in a protest addressed to the powers charged that although the ship was painted white, bore all the markings required by the Hague convention, and that its character had been notified to the Turkish government,

<sup>1</sup> *Ibid.*, p. 113.

<sup>2</sup> The French text of the protest may be found in the *Rev. Gén. de Droit Int. Pub.*, 1915, Docs. p. 137. Cf. also the protest of the French minister of marine, *ibid.*, p. 114.

<sup>3</sup> The *Asturias*, it was claimed, was mistaken for a British transport. Moreover, the markings were not sufficiently illuminated, in consequence of which they were not recognized until after the torpedo had been discharged. Regret was expressed for the act. See the text of the German reply, *Ibid.*, p. 139.



a submarine circled around it while it was lying at anchor and deliberately discharged two torpedoes against its side from a distance of only one hundred yards. The act was, therefore, not only a flagrant violation of international law, but an act of sheer piracy.<sup>1</sup> The Turkish government admitted the charge, but asserted that the *Portugal* was not flying the Red Cross flag, that its name was not visible, and that it was mistaken for a transport.<sup>2</sup> To this claim the Russian government replied that the clearness of the weather and other circumstances under which the attack was made excluded all possibility of a mistake, and that the sinking of the ship was wanton and deliberate. In July following, the Russian hospital ship *Uperiode* (which took the place of the *Portugal*) met a similar fate under similar circumstances at the hands of either a Turkish or German submarine. The Russian Red Cross society addressed a protest to the Red Cross societies of the world expressing profound indignation at this crime, which, it said, was without excuse, since the status of the vessel had been notified to the enemy governments and it was marked in accordance with the requirements of the Hague convention.<sup>3</sup>

On November 21, 1916, the Great White Star liner *Britannic*, which had been converted into a hospital ship, was torpedoed by a submarine or sunk by a mine in the Aegean Sea while engaged in transporting over one thousand sick and wounded British soldiers from the Gallipoli peninsula to England. About fifty lives were lost. The medical staff and crew numbered more than five hundred persons. The ship was painted white, with a broad red band around her hull and large red crosses on her sides, fore and aft, and at night she was highly illuminated with electric lights. There was, therefore, no excuse for mistaking her character.<sup>4</sup> Three days later the hospital ship *Bremer Castle* was either torpedoed or mined.

<sup>1</sup> Text of the Russian protest in the *New York Times*, April 5, 1916.

<sup>2</sup> Text of the Turkish explanation, *ibid.*, April 17, 1916.

<sup>3</sup> London weekly *Times*, July 21, 1916.

<sup>4</sup> *New York Times*, November 23, 1916. A detailed description of the torpedoing of the *Britannic* by one of the survivors was published in the *New York Times* of March 15, 1918. It was subsequently admitted in Germany that the *Britannic* was torpedoed on the ground that she was carrying troops. Cf. an English brochure entitled *The War on Hospital Ships, from the Narratives of Eye Witnesses* (London, 1917), p. 6., also Archer, *The Pirate's Progress*, p. 90.

§ 321. **The German Charge respecting the Misuse of British Hospital Ships.** On January 28, 1917, the German Imperial government addressed a memorandum to the British government in which it charged that for some time enemy governments, and especially the British government, had been using their hospital ships "not only for the purpose of rendering assistance to the wounded, sick and shipwrecked, but also for military purposes, in violation of the Hague convention." It charged, particularly, that during the Gallipoli campaign the British government had designated to the governments of the Central powers an "unproportionately" large number of vessels as hospital ships, a fact which tended to arouse suspicion, and it called attention to the fact that the Turkish government had addressed a protest to neutral powers that English commanders had used hospital ships in the eastern Mediterranean for the purpose of bringing back troops and supplies. The memorandum also complained that vessels were often notified as hospital ships, then withdrawn and subsequently placed again on the list of hospital ships, thus arousing suspicion and creating confusion and uncertainty as to their character. Furthermore as early as 1915 the German government had received "numerous trustworthy reports" that English hospital ships in the Channel were transporting munitions to the continent under the protection of the Red Cross emblem, and that English and French soldiers had frankly admitted that they were being so used. And the worst breach of the Hague convention was that both English and French hospital ships were being regularly used for the transportation of troops. A mass of documentary evidence consisting mainly of reports of German officers and statements of witnesses was submitted in support of the charges. In view of this evidence establishing the guilt of the Entente governments, the German government could no longer permit those governments "to despatch their troops and munitions transports to the principal theatres of war under the hypocritical cloak of the Red Cross."

"They therefore declare that from this moment on they will no longer suffer any enemy hospital ship in the maritime zone which is situated between the lines Flamborough Head to Terschelling, on the one hand, and Ushant to Lands End on the other. Should enemy hospital ships be encountered in this maritime zone, after an appropriate lapse of time,

they will be considered as belligerent and will be attacked without further consideration. The German government believe themselves all the more justified in adopting these measures, as the route from Western and Southern France to the West of England still remains open for enemy hospital ships, and the transport of English wounded to their homes can consequently be effected now as heretofore without hindrance."<sup>1</sup>

§ 322. **The British Reply.** In a memorandum of October 5, 1917, transmitted to the German government through the medium of the Dutch legation, Mr. Balfour categorically denied the allegations of the German government and expressed the hope that it would withdraw the false charges thus made. He called attention to the remarkable fact that German submarines and other war ships had never once exercised the right of stopping and inspecting British hospital ships in order to verify the suspicions of submarine commanders, a right allowed by article 4 of the Hague convention for the adaptation of the principles of the Geneva convention to maritime warfare.<sup>2</sup> Instead, the German government preferred to appeal for support of its charges to conjectural statements of persons who never had an opportunity to ascertain whether there was any real foundation for their assumptions. Mr. Balfour denied that the number of hospital ships employed in evacuating the wounded from Gallipoli was excessive; on the contrary, it was inadequate, and transports unprotected by the Hague convention had to be employed. As to the charge of withdrawing and restoring vessels once notified as hospital ships, he pointed out that there was no rule of the Hague convention which required that a ship

<sup>1</sup> Subsequently, on March 29, the German government in order to prevent the alleged misuse of enemy hospital ships in the Mediterranean Sea, announced that "after a suitable interval enemy hospital ships encountered within the safety area recognized by the war zone decree of January 31, 1917, would be regarded by the German naval forces as belligerent and will be attacked forthwith." In order to enable enemy powers to evacuate their sick and wounded from Saloniki, the Greek "lane" mentioned in the war zone decree of January, 1917, would be open for the navigation of hospital ships, subject to the condition, among others, that the names of the ships with their dates of arrival and departure be notified in each separate case to the German government at least six weeks in advance and that for every voyage a neutral representative should furnish an explicit assurance that the ship had on board only sick, wounded, and medical personnel.

<sup>2</sup> An apparent exception was the stopping by a German submarine of the hospital ship *Dunluce Castle* on February 23, 1917, long enough to examine her papers.

once notified must be retained in the hospital service for the duration of the war. The changes made, he said, were due to the alterations in the requirements for various classes of tonnage, caused by the sinking of ships by submarines, and to changes in the military situation. As to the charge in respect to the use of hospital ships for the transportation of troops and munitions Mr. Balfour declared that it was absolutely without foundation. No supplies except Red Cross stores and no persons except the medical and hospital personnel, both protected by the Geneva convention, had been embarked, and it was probable that the witnesses upon whose testimony the German government relied in support of its charges had assumed that the cases of Red Cross stores were really munitions of war, and that the members of the Royal Medical Corps, dressed as they were in khaki, were troops. Mr. Balfour then considered each specific charge contained in the annexes to the German memorandum and cited evidence to show that they were unfounded.<sup>1</sup> It is quite evident that the German submarine commanders acted upon mere suspicion, since they could not have known whether the British hospital ships were carrying goods or persons in violation of the Geneva convention, without stopping them and making an examination of their cargoes and passengers. German writers like Wehberg<sup>2</sup> have pointed out, as did Mr. Balfour, that the obvious remedy to be applied by a belligerent in case of suspicion is to inspect the ship and verify its true character. But as in the case of the torpedoing of neutral merchant vessels suspected of carrying contraband, German naval commanders never troubled themselves with this formality. Their conduct was indefensible in both cases, and as regards hospital ships it was barbarous and inhumane. Nowhere in the Hague conventions of 1899 and 1907 is the right to sink a hospital ship under any circumstances admitted. They speak of "capture" and "detention" for violation of the provisions of the convention, but it is safe to assume that no member of either Conference ever intended to sanction the right of destruction.<sup>3</sup> The conduct

<sup>1</sup> The German memorandum with its annexes together with the British reply are contained in a British white paper entitled *Correspondence with the German Government regarding the Alleged Misuse of British Hospital Ships*, Misc., no. 16 (1917), Cd. 8692.

<sup>2</sup> *Capture in War on Land and Sea* (Eng. trans. by Robertson), p. 83.

<sup>3</sup> In a statement issued by the British government in April, 1917, it was said of the German announcement of January 29: "The illegal and inhuman sub-

of the German naval commanders constituted a sorry contrast to that of the commanders of British cruisers who stopped and examined German hospital ships in accordance with article 4 of the Hague convention, with a view to verifying their true character. It is hardly necessary to add that no German hospital ship was ever sunk by a British or French submarine or warship. German submarines, in fact, attacked British hospital ships long before the alleged misuse of such ships took place, as the instances referred to above conclusively show. The explanation given by the *London Times* was probably the true one, namely, that the attacks upon hospital ships were dictated by the growing need of forcing an early decision. Consequently, the German authorities had chosen to sink everything they could at sea, and hospital ships were included, because it was assumed that they would be replaced, their loss thus contributing to the discontinuance of shipping on which all the German hopes were set.<sup>1</sup>

§ 323. Sinking of the *Asturias*, *Gloucester Castle*, *Lanfranc*, *Donegal*, and *Dover Castle*. Shortly after the announcement of the German government of its intention to sink all enemy hospital ships within the area mentioned in its memorandum of January 28, 1917, the British government issued a statement that it had caused the German government to be informed that

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marine warfare which Germany has waged upon merchant shipping has for some time been openly adopted against hospital ships flying the Red Cross flag and otherwise acting in complete conformity with the requirements of the Hague convention. This culmination of savagery has brought the world face to face with a situation that is without parallel in civilized warfare. It has no justification in any conceivable distortion of international law, nor in the most brutal creed of necessity."

<sup>1</sup> London weekly *Times*, April 27, 1917. On April 25, 1917, a German wireless message received in London contained the statement that from papers found on American aviators who had been brought down it was evident that many of them had crossed the Atlantic in hospital ships and were certified as members of the American ambulance service in France, from which they were subsequently transferred to the aviation service. The inference was drawn that American hospital ships would, therefore, be torpedoed in case any such ships were encountered in the transatlantic service. The secretary of the British admiralty thereupon issued a statement in which he declared that no hospital ship, British or American, had ever transported anybody but invalids and the necessary medical staff. The war department of the United States also denied the charge, and the secretary of state caused an inquiry to be sent to the German government asking it to furnish the proof, if it had any, to substantiate the charge. *New York Times*, May 4, 1917.

if the threat were carried out, reprisals would be immediately taken by the British authorities.<sup>1</sup>

The threat of reprisal, however, appears to have had no effect on the German government, and the sinking of hospital ships now became a regular feature of German submarine warfare. On March 20 the *Asturias*, the same hospital ship which had been attacked by a German submarine in February, 1915, was torpedoed without warning and sunk. Thirty-one persons lost their lives, twelve were reported missing, and thirty-nine were injured. At the time it was torpedoed, the *Asturias* bore all the markings required by the Hague convention and was brilliantly illuminated. The sinking of the ship was, therefore, deliberate and wanton.

Ten days later the *Gloucester Castle* suffered the same fate, and the German admiralty admitted that the act was committed by one of its submarines. On the same night (March 30-31) the British hospital ship *Saita* was sunk by a German mine in the English Channel, some forty persons losing their lives. On April 17 the hospital ships *Donegal* and *Lanfranc*, while crossing the Channel, both carrying large numbers of British wounded, were torpedoed and sunk without warning. The *Lanfranc* also had on board, besides British wounded, 167 wounded German prisoners who were being taken to England for hospital treatment.<sup>2</sup> Of the latter, 152 were rescued by the crews of British patrol boats at great risk to themselves. On May 10 two other hospital ships were torpedoed (names not given), and some two weeks later (May 26) the *Dover Castle* met a similar fate in the Mediterranean Sea.

§ 324. Protest of the International Red Cross Committee. Against these atrocities the international committee of the Red Cross society at Geneva, whose duty it is to enforce, as far as possible, respect for the Red Cross convention by reporting violations of the same, addressed an energetic protest to the German government.

<sup>1</sup> New York Times, July 1, 1917.

<sup>2</sup> Details of the sinking of both vessels may be found in the New York Times of April 22, 1917, in the London weekly Times of April 27, and the London daily Telegraph of April 23 and 24, 1917. The total number of lives lost in consequence of the sinking of the *Donegal* and the *Lanfranc* was placed at seventy-five, of whom sixteen were German wounded. New York Times, August 19, 1917.



"In torpedoing hospital ships," the protest declared, "it is not attacking combatants but defenceless beings, wounded or mutilated in war and women who are devoting themselves to the work of relief and charity. Every hospital ship is provided with the external signs prescribed by international conventions, the use of which has been regularly notified to belligerents, and should be respected by belligerents."

It called attention, as the British government had already done, to the provision of the Hague convention which allows belligerents to visit and search hospital ships which are suspected of being used for military purposes, and it added: "Belligerents have no right to sink hospital ships and expose to death their staffs of surgeons and nurses and their wounded." Even if the truth of the German charges were admitted, "the Imperial government of Germany," it said in conclusion, "will assume a serious responsibility before the civilized world in persisting in a course contrary to the humanitarian conventions that it has itself undertaken to respect."<sup>1</sup>

§ 325. **British and French Counter-measures.** But this strong appeal from a great neutral agency which had no other interest than seeing all belligerents alike observe the laws of humanity and the conventional law of nations for the benefit of suffering men whom the hazards of battle have rendered helpless, made no impression on the German government, and the war against hospital ships, against the sick and wounded, and against the men and women who were engaged in ministering to them went on without relaxation. Earlier in the year, following the first announcement of the German government of its intention to sink hospital ships, the British government being convinced that the marking and illuminating of its hospital ships at night only served to attract German submarines and render them more conspicuous targets, adopted the policy of removing the Red Cross insignia and at the same time, in the hope of deterring German submarines from continuing their ruthless methods, announced that in the future German wounded would be carried on the same vessels with British wounded, and that the French government had adopted a similar expedient. But even this announcement appears to have had no effect, and, in

<sup>1</sup> Text of the protest in the *New York Times* of April 25, 1917. See also an article by P. des Gouttes, Secretary General of the International Committee, entitled *Le Torpillage des Navires-Hôpitaux*, 24 *Rev. Gén.* pp. 469 ff.



fact, hospital ships, which the submarine commanders must have known were carrying German wounded, were sunk without hesitation.<sup>1</sup> Finding this expedient ineffective, the British and French governments decided to try the more heroic remedy of reprisals, resort to which they had threatened earlier in the year,<sup>2</sup> and on April 14 British and French aeroplanes bombarded the "open" German town of Freiburg. In the latter part of April the German government announced that it would adopt "the sharpest measures of reprisals" if German prisoners were embarked upon hospital ships of the Entente powers and thereby exposed to the danger of torpedoes, and some two weeks later it was officially announced at Berlin that as a measure of reprisal for the placing of a German general and fifteen staff officers on a French hospital ship in the Mediterranean, the German authorities had placed three times the number of French officers of corresponding rank at points in the western industrial districts which were especially subject to aerial attack by aeroplanes of the Entente powers.<sup>3</sup>

The British and French governments, however, had learned earlier in the war when they undertook by way of reprisal to differentiate between the treatment of prisoners captured on German submarines and other prisoners, that they could not beat Germany at the game of reprisals, and it does not appear that further resort was had by either government to this method of dealing with her.<sup>4</sup> For a time the British government appears to have seriously considered abandoning its policy of transporting British wounded to England in hospital ships and of treating them in hospitals on the continent, to which almost the entire medical and hospital staff of the United Kingdom would have to be transported. In August, 1917, an agreement appears to have been concluded between the British and French govern-

<sup>1</sup> E.g., the *Lanfranc*, which had on board 167 wounded Germans who were being transported to England for hospital treatment.

<sup>2</sup> On January 31 the government of the United States was requested by the British government to inform the German government that if the German threats were carried out, immediate reprisals would follow.

<sup>3</sup> *New York Times*, May 11 and May 13, 1917, Freiburg, which had already been bombarded by British and French aeroplanes was one of the places selected.

<sup>4</sup> Mr. Bonar Law announced in the House of Commons in March, 1918, that the policy of placing German officers of superior rank on hospital ships to safeguard the latter against attack had been carefully considered by the naval and military authorities, and that it was not being adopted.

ments on the one hand and the German government on the other, under which neutral commissioners were to be placed on all Entente hospital ships in order to guarantee that they transported only sick and wounded together with the Red Cross personnel, Germany on her part engaging that her submarines would not attack hospital ships carrying such commissioners.<sup>1</sup>

§ 326. Sinkings in 1918; the *Rewa*, the *Glenart Castle*, the *Guilford Castle*, the *Llandoverly Castle*, the *Warilda*. This expedient, however, did not put an end to the German war upon hospital ships, and it was renewed in the year 1918. On the night of January 4, 1918, the British hospital ship *Rewa* was torpedoed without warning and sunk by a German submarine in the British channel while on her way from Gibraltar. At the time, the ship bore all the markings required by the Hague convention and was highly illuminated. She was not and had not been in the barred zone prescribed by the German memorandum of January 28, 1917. Five hundred and fifty persons were on board, but happily all but three were rescued.<sup>2</sup> On February 26 the British hospital ship *Glenart Castle*, carrying a crew of 150 men and a hospital staff of fifty persons, was torpedoed by a German submarine at the mouth of the Bristol channel at 4 o'clock in the morning, and she sank in seven minutes. Twenty-two survivors reached port after having been in the life-boats for seven hours. She was sunk in the "free area" in violation of a German pledge that hospital ships would not be molested therein. Some of the survivors testified to having seen the submarine.<sup>3</sup> On March 10 the British hospital ship *Guildford Castle* with 450 wounded soldiers on board was torpedoed by a German submarine in the same waters, but fortunately escaped destruction. At the time, she was flying a Red Cross flag of the largest size, the distinctive marks were illuminated, and the weather was clear, the ship having a visi-

<sup>1</sup> New York *Times*, August 19, 1917.

<sup>2</sup> New York *Times*, January 10, 1918, and London weekly *Times*, January 18, 1918. A Wolff despatch of January 12 stated that the German authorities were unable at that time to give a final statement as to the responsibility for the sinking of the *Rewa*, as "the submarine which might have been concerned was still at sea." It added: "Nevertheless competent quarters regard it as impossible that the ship should have been torpedoed by a submarine; accordingly the only possibility is that she was sunk by a mine."

<sup>3</sup> New York *Times*, February 27, 1918.

bility of about five miles. The attack, therefore, appears to have been deliberate and without excuse.<sup>1</sup>

On the night of June 27 the hospital ship *Llandoverly Castle*, which had been chartered by the Canadian government for the transportation of sick and wounded soldiers from England to Canada, was torpedoed by a German submarine without warning, seventy miles from the Irish coast. The ship was on her way to England and had on board 258 persons, including eighty men of the Canadian army medical corps and fourteen women nurses. She was displaying the regulation hospital lights. The ship sank in ten minutes, and only twenty-four persons aboard were saved. The circumstances of the sinking leave little doubt that the act was deliberate and premeditated. After the discharge of the torpedo the commander of the submarine ordered the captain of the ship and the major of the medical corps aboard the submarine, whereupon he informed them that he had torpedoed the ship because she was carrying American aviators and other persons in the military service of the allies. The captain gave his word of honor that he had never transported any persons except sick and wounded soldiers, medical staff, nurses, and crew. In the meantime the boiler of the sinking ship exploded, whereupon the commander of the submarine found another excuse, namely, that the explosion was due to the presence of ammunition on board. This, however, was evidently an after-thought. How he knew there were American aviators aboard the ship does not appear, since she was sunk at sight during a dark night and without the formality of search. The act was variously characterized as an "unspeakable outrage," "the crowning atrocity" of the German war against hospital ships, and the like.<sup>2</sup>

On August 3, the anniversary of the outbreak of the war between Great Britain and Germany, two German submarines

<sup>1</sup> *Ibid.*, March 15, 1918, and London weekly *Times*, March 22, 1918.

<sup>2</sup> The details of the sinking may be found in the New York *Times* of July 2 and 3, 1918. The German newspapers defended the act. The *Kölnische Zeitung* said she was in the barred zone. The *Westfälische Zeitung* said she was probably sunk by a mine, but even if she were sunk by a German submarine, it was a justifiable act, since most of the British hospital ships were armed. The torpedoing of the *Llandoverly Castle* aroused intense indignation in England and elsewhere, and the British seaman's union, embracing two hundred fifty thousand men, resolved that they would not tolerate a German on a British ship or take a British ship into any German port for a term of years.

made a rich haul. One of them sank without warning a Norwegian bark (the *Eglinton*) with the loss of all on board except one; the other torpedoed and sank the British ambulance transport *Warilda*, with the loss of 123 lives. The latter ship had on board, in addition to a crew of 115 men, 600 wounded soldiers, the majority of whom were in such serious condition that they would have been unable to save themselves under the most favorable conditions, and it would have been difficult to transfer them to the life-boats. The attack occurred many miles from land on a pitch dark night while a stiff gale was blowing. Had not the ship kept afloat for two hours, few if any of the more than seven hundred persons on board would have been saved.<sup>1</sup> The German government appears to have given no explanation for this atrocious act, the last of the kind, it is refreshing to record, which can be placed to the credit of the German submarine forces.

§ 327. Charges against the Entente Powers; Cases of the *Elektra*, the *Ophelia*, and the *Paklat*. Germany and her allies likewise made certain charges against their adversaries in respect to the mistreatment of hospital ships. The only instance, it appears, however, in which a hospital ship was alleged to have been destroyed by Germany's enemies was the alleged torpedoing by a British or French submarine of the Austro-Hungarian hospital ship, *Elektra*, in the Adriatic Sea on March 18, 1916, in consequence of which one sailor and two nurses were drowned. The Austrian authorities claim that the ship was properly painted and marked in accordance with the provisions of the Hague convention, and the Austro-Hungarian Red Cross society denounced the act as "an indelible shame" upon the navy to which the submarine belonged.

There were also loud complaints in Germany over the seizure by a British cruiser in October, 1914, of the *Ophelia*, which the German government claimed was a *bona fide* hospital ship. The vessel was placed in the custody of the British prize court, by which she was condemned on the ground that in fact she was not a hospital ship but a vessel engaged in scouting.<sup>2</sup> The

<sup>1</sup> London weekly *Times*, August 9, 1918, and the Paris *Temps*, August 7, 1918.

<sup>2</sup> The procedure of the British naval commander in dealing with the *Ophelia* formed a striking contrast to that of the German submarine commanders in respect to hospital ships under suspicion. Instead of torpedoing it, as German submarine commanders habitually did, the English captain seized it and put it in the custody of a prize court, where its true character was determined judicially.

German government alleged that on August 10, 1914, she had been refitted as a hospital ship by the Hamburg American line for the use of the government; that she was painted and marked in accordance with the requirements of the Hague convention; that she flew the Red Cross flag; that she had been properly notified to the British government, and that she had never engaged in scouting or other operations forbidden by the convention. The prize court, however, held that the equipment of the vessel was wholly inadequate for hospital purposes, that she carried apparatus and appliances for signalling, and that at the time of capture she was not being used for hospital purposes.<sup>1</sup> Moreover, the ship attempted to escape visit and search, and the commander threw overboard the records and papers, among which was a secret code. The German government issued a white book<sup>2</sup> in which it attacked the judgment of the British prize court as being contrary to the Hague convention. It denied the truth of the contention of the prize court that the vessel was not a *bona fide* hospital ship and asserted that she was never used for military purposes.<sup>3</sup>

The German government likewise protested against the capture and condemnation by the British prize court of the German steamer *Paklat* engaged in conveying women and children from Tsing-Tau when this port was being besieged by the allied forces. The German government contended that the *Paklat* was "employed on a philanthropic mission" and therefore was exempt from capture by the terms of article 4 of the eleventh Hague convention of 1907. The British government, however, called the attention of the German government to the act of a German submarine in sinking the French refugee ship *Amiral Gauteaume*; Germany could not, therefore, claim the right to torpedo a refugee ship and at the same time protest against the seizure and trial of a German vessel while on a similar

<sup>1</sup> Trehern's *British and Colonial Prize Cases*, Vol. I, pp. 210 ff. "In a sentence," said Sir Samuel Evans, president of the prize court, "no wounded, sick or shipwrecked person was ever on board the ship; not a hospital cot, bandage, or surgical instrument had been used either on the ship or in connection with her; and no service had ever been rendered or offered to any wounded, sick, or shipwrecked person by the *Ophelia* or any of her staff."

<sup>2</sup> *Denkschrift der Deutschen Regierung im Sachen der Beschlagname des Hilfs-lazarettsschiffs "Ophelia" durch Britische Seestreits-Kräfte*, November, 1915.

<sup>3</sup> Cf. also the German defence in Muller-Meiningen, *Der Weltkrieg und der Zusammenbruch des Völkerrechts* (1915), pp. 510-514.

errand. The *Paklat* was therefore put in the custody of the prize court by which she was condemned as not belonging to the class of vessels contemplated by article 4 of the Hague convention.<sup>1</sup>

§ 328. **Torpedoing of Ships Engaged on Philanthropic Missions.** Another class of ships that were again and again the victims of German submarine ruthlessness were those engaged in the transportation of food and other supplies to the stricken people of Belgium. One of the first of these victims was the American steamer *Harplyce*, which was torpedoed by a German submarine on April 8, 1915. The ship flew the flag and bore the markings of the Belgian relief commission and carried a safe-conduct issued by the German minister at the Hague. The commander of the submarine did not, of course, take the trouble to verify the nationality or character of the vessel. In addition to the loss of the cargo of supplies which were sorely needed by the destitute inhabitants of Belgium, the lives of fifteen persons were destroyed.<sup>2</sup>

During the same month the *Ulriken* (Norwegian) and the *Otamas* (Greek), while engaged on the same mission of philanthropy, were sunk by a German submarine, also without warning and in violation of the pledges of the German government to spare vessels of this kind. About the same time, the *Embiricas* (Greek), while carrying a cargo of grain for the Belgian relief commission, was torpedoed. The crew were set adrift in two small boats, one of which was never heard of again.

In January, 1916, the British steamer *Tokomaru*, bearing a cargo from New Zealand for the relief of Belgian refugees, was torpedoed without warning off Hauri by a German submarine. The vessel, however, did not bear the insignia of the Belgian relief commission. But on May 2, the *Hendron Hall* and the *Friedland*, two British steamers engaged in Belgian relief work, both of which bore the markings of the relief commission, were torpedoed without warning. The former sank, but the latter succeeded in escaping.<sup>3</sup>

In the spring of 1917 the German government inaugurated what appears to have been a policy of deliberate and indiscriminate war against all Belgian relief ships, as it did against

<sup>1</sup> Trehern, *British and Colonial Prize Cases*, Vol. I, p. 515.

<sup>2</sup> *Rev. Gén. de Droit Int. Pub.* (1915), p. 207.

<sup>3</sup> *New York Times*, November 23, 1916.



hospital ships. On February 3 the Belgian relief steamer *Euphrates*, while outward bound in ballast, was torpedoed without warning, and most of the crew drowned. On March 8 the Belgian relief steamer *Storstad* (Norwegian) was deliberately sunk by a German submarine, particular precautions being taken that the work of destruction should be made complete. The steamer bore the markings of the relief commission and carried a declaration stamped by the German consul at Buenos Aires, promising that it would not be molested if it complied with the requirements of the relief commission.<sup>1</sup> During the same week the *Lars Fostenes* (Norwegian), engaged on the same mission, met with a similar fate, only one member of the crew being saved. On March 16 the Dutch steamer *Haelen*, while flying the flag of the Belgian relief commission, was attacked by a German submarine while the vessel was returning in ballast from Rotterdam to New York.<sup>2</sup> It succeeded in escaping, but eight members of the crew were killed by shell fire, while nine others are alleged by the captain to have been killed after they had been put into the life-boats. On the same day the *Tunisie*, a Dutch steamer of the same character, met a similar fate. Both the *Haelen* and the *Tunisie* bore safe-conducts issued by the German legation at The Hague, both flew the flag of the Belgian relief commission, and both were outward bound in ballast. On the following day (March 17) the Belgian steamer *Ministre de Sinet*, while outward bound in ballast and bearing a safe-conduct issued by the German minister at The Hague, was shelled by a German submarine, but she managed to escape. In April, 1918, however, she was sunk either by a mine or submarine. On March 31 the Norwegian steamer *Festein*, bearing the relief commission's markings and carrying a safe-conduct issued by the Swiss minister at Washington on behalf of the German government, was torpedoed and sunk in broad daylight and without warning, by a German submarine off the Dutch coast. During the first week of April the *Camilla* (Norwegian), the *Trevier*<sup>3</sup> (Belgian), the *Carnetta*, and the *Anna Fostenes* (Nor-

<sup>1</sup> London weekly *Times*, March 16, 1917. The German authorities, however, denied that the *Storstad* carried a safe-conduct and declared that if it had, it would have afforded no protection, since the vessel was within the barred zone.

<sup>2</sup> New York *Times*, April 8, 1917.

<sup>3</sup> It was charged that while the boats of the *Trevier* were being lowered, the submarine fired upon them, severely wounding the captain, the mate, the engineer, and several others. New York *Times*, April 6, 1917.



wegian) were sunk with their cargoes of food stuffs. All were torpedoed without warning in broad daylight, all bore the markings of the Belgian relief commission, all carried safe-conducts issued by the Swiss minister at Washington acting on behalf of the German government, and all were within the safety area freedom of which for the navigation of Belgian relief steamers the German government had promised.<sup>1</sup> Various other Belgian relief steamers were torpedoed by German submarines during April and May (1917), among them the *Kongsli*<sup>2</sup> and the *Ringhorn*.<sup>3</sup> In September, 1918, the Norwegian steamship *Björnstjerne Björnson*, while in the service of the Belgian relief commission, was attacked by a German submarine outside the war zone, but luckily escaped destruction.

§ 329. **German Excuses.** No satisfactory explanation was ever given by the German government for its warfare against this class of vessels. During the first years of the war, before the German government had declared its intention of sinking Belgian relief steamers, the excuse alleged, so far as any excuse at all was offered, was error on the part of the submarine commanders; but this plea was merely a pretext, for in every case the vessels flew the insignia of the relief commission, and had the submarine commanders made any attempt to verify their character, the errors alleged would have been impossible. Later, the German government alleged the same excuse that it put forward as a justification for the sinking of hospital ships, namely that the flag and insignia of the commission were being abused to protect the ships by which they were marked, while engaged in other services than those of relief work. Particularly, they were charged with attacking German submarines under the ruse of the distinctive markings of the commission, and the charge was even made that they were used as decoys to trap German submarines. Whatever may have been the truth of this charge in respect to British and French vessels engaged in the service of the relief commission, it is not probable that neutral vessels (and most of those sunk were of neutral nationality) engaged

<sup>1</sup> *New York Times*, April 10, 1917.

<sup>2</sup> This vessel, however, was rescued and towed into port.

<sup>3</sup> At the time of the sinking of the *Ringhorn* it was not in the service of the relief commission, having completed its voyage, but it bore a safe-conduct issued by the German authorities.

on such missions ever made use of the commission's flag and insignia for military purposes. In a few cases (e.g., the *Euphrates* and the *Lars Kruse*) the German government denied that the vessels were torpedoed by German submarines, but the evidence pointed strongly to the contrary. In February, 1917, after the German government had proclaimed its new barred zone, and announced its intention of resuming unrestricted submarine warfare, it notified the director of the Belgian relief commission that in the future its ships must be sent to Rotterdam by a route northward of the zone thus declared. The commission complained that the notice given was entirely too short to enable it to make arrangements either for the alteration of the route for its ships then in the war zone or for the transportation of its supplies then stored in England. In consequence of this representation the German government conceded a safety lane through the North Sea to Rotterdam and agreed to respect the markings of the relief commission and to furnish safe-conducts to its steamers by this route. These arrangements were completed on February 28, and the movement of the Belgian relief steamers from America was resumed after a month's delay. But the commission's appeals for safe-conducts for its steamers then in English ports the German government would not grant, except that ultimately it agreed to allow four of them to proceed after May 1.<sup>1</sup> In view, however, of the perishable nature of the cargoes the permission offered could not be availed of. In consequence of the attitude of the German government the commission was prevented from delivering a large portion of its supplies which were sorely needed by the population of Belgium. What was worse, the German authorities entirely failed to respect the safe-conducts issued under its authority to the commission's ships.<sup>2</sup> In other cases the German government undertook to place the responsibility on

<sup>1</sup> In reply to the commission's appeals that its vessels in English ports should be allowed to proceed to Rotterdam and return without molestation the German government stated that this concession could not be granted, because "it would mean the suppression of submarine warfare on the days the vessels were passing through the barred area since this would be the only way of excluding the possibility of firing on the ships through mistake, whereas the British on the same days would be enabled without danger to get food transports from Holland." *New York Times*, May 28, 1917.

<sup>2</sup> Cf. the report of the Belgian relief commission, of April 9, 1917, in the *New York Times* of November 25, 1917.

the relief ships themselves, which, it was alleged, did not take the trouble to avoid the danger zone. "Therefore," it was added, "if Belgian civilians starve, it is because British selfishness drives the captains of relief vessels to seek only to disregard rules made for their safety." But this was no sufficient justification, for even if the vessels of the commission were encountered in the danger zone, their character and mission were shown by their distinctive markings and were well known to German submarine commanders. In any case, it is not clear what "British selfishness" had to do with it, for in fact most of the relief ships sunk were not, as stated above, British, but neutral vessels.

The German submarine commanders in practice appear to have paid no attention to the flag of the commission or to have made any attempt to determine whether the vessels carried safe-conducts or not, although all of them were so provided.<sup>1</sup> Furthermore, Belgian relief ships were again and again sunk while traversing the so-called safety zone, equally with those in the forbidden area.

§ 330. Conclusion. It is hard to avoid the conclusion that the German war upon Belgian relief ships was wanton and indiscriminate, and that it was based on the assumption that every neutral vessel sunk and every cargo of food stuffs destroyed reduced in that proportion the available world's supply, and would, in the end, inure to the military advantage of Germany. The whole record of Germany's war against neutral vessels engaged in this humanitarian and indispensable service, as was her record in respect to the destruction of hospital ships engaged in the work of transporting and ministering to the sufferings of the sick and wounded, was shameless and inexcusable. It was not only contrary to the express terms of the Hague convention, which confers an immunity upon vessels, belligerent as well as

<sup>1</sup> German practice was thus described by President Wilson in his address to Congress on April 2, 1917: "Vessels of every kind, whatever their flag, their character, their cargo, their destination, their errand, have been ruthlessly sent to the bottom without warning and without thought of help or mercy for those on board, the vessels of friendly neutrals along with those of belligerents. Even hospital ships and ships carrying relief to the sorely bereaved and stricken people of Belgium, though the latter were provided with safe-conduct through the proscribed areas by the German government itself and were distinguished by unmistakable marks of identity, have been sunk with the same reckless lack of compassion or principle."

neutral, which are engaged in "philanthropic missions" <sup>1</sup> — to say nothing of the principles of humanity and the long-established customary rules of civilized warfare — but it was in violation of the terms of the German prize code itself (article 6) <sup>2</sup> and involved a deliberate repudiation of solemn engagements entered into between the German government and the governments of various neutral countries. It afforded undisputed proof, if further proof were needed, that the German government could not be trusted to keep its promises or observe its engagements with other governments, and that with it the sacred principles of humanity must, in the language of the German war manual and German text writers, yield to "whatever contributes to the attainment of the object of the war." <sup>3</sup>

<sup>1</sup> The convention of 1907 relative to certain restrictions upon the right of capture in naval war (art. 4).

<sup>2</sup> Which exempts from capture, in the very language of the Hague convention, vessels (belligerent as well as neutral) engaged in "philanthropic missions."

<sup>3</sup> The Belgian relief commission in its report of April 9, 1917, thus characterized the conduct of the German government: "It is impossible to express the indignation which we rightly feel over these acts, and we are at a loss to know whether this continued sinking of steamers in violation of their undertakings is a settled policy of the Imperial government or whether it is due to reckless irresponsibility of submarine commanders. In any event, the immediate peril and loss of life of innocent seamen continuing resolutely in the service of helpless people are transcended only by the tragedy of suffering imposed on those millions of men, women, and children we are trying to preserve." *New York Times*, November 25, 1917.

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